FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

JULY 1989
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DECISIONS

JULY 1989

Commission Decisions

Administrative Law Judge Decisions

Administrative Law Judge Order

JULY 1989

Review was granted in the following cases during the month of July:

Secretary of Labor, MSHA v. Green River Coal Company, Docket No. KENT 88-152. (Judge Koutras, June 5, 1989)

Paula Price v. Monterey Coal Company, Docket No. LAKE 86-45-D. (Judge Melick, June 19, 1989)

Review was denied in the following case during the month of July:

Troy W. Conway, Jr. v. Peabody Coal Company, Docket No. KENT 88-127-D. (Judge Melick, June 15, 1989)

The Direction for Review in Amax Potash Corporation, Docket No. CENT 87-72-M was vacated on July 24, 1989 after a motion from Amax to withdraw the petition for discretionary review.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 6, 1989

LOCAL UNION 1810, DISTRICT 6 UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. LAKE 87-19-C
NACCO MINING COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This is a compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"). The principal issue presented is whether an operator may challenge in a compensation proceeding the validity of a withdrawal order and its modification, despite the operator's failure to contest previously the order or the modification pursuant to section 105 of the Mine Act (n.4 infra). 1/ Commission Administrative Law Judge William

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1/ Section 111 of the Mine Act provides in part:

> [1] If a coal or other mine or area of such mine is closed by an order issued under section [103], section [104], or section [107] of this Act, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to

Fauver held that the withdrawal order and the modification that idled the miners had not been timely contested by Nacco Mining Company ("Nacco") and had become final for purposes of section 111. Finding that the prerequisites for compensation were met, the judge awarded the complainants compensation, including prejudgment interest. 9 FMSHRC 1349 (August 1987)(ALJ); 9 FMSHRC 1671 (September 1987)(ALJ). For the reasons that follow, we affirm the judge's award of compensation and interest, but direct that the interest be calculated in accordance with the formula set forth at 54 Fed. Reg. 2226 (January 19, 1989). See Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988).

The material facts are not in dispute. On December 10, 1984, during an inspection of Nacco's Powhatan No. 6 underground coal mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") found that an intake-ventilated escapeway in the north mains area of the mine was not being maintained to ensure safe passage of mine personnel, including disabled persons. The inspector, citing a violation of 30 C.F.R. § 75.1704, issued Order of Withdrawal No. 2329934, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2). 2/ The cited conditions consisted of a failure to maintain

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> full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] of this [Act], for a failure of the operator to comply with any mandatory health or safety standard, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (sentence numbers added for convenience).

2/ Section 75.1704, which substantially repeats section 317(f)(1) of the Mine Act, 30 U.S.C. § 877(f)(1), provides:

> Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked.

appropriate height and width in "many locations" in the escapeway and the presence of obstructions in the escapeway. The withdrawal order closed all areas in the north mains of the mine inby the two main east junction.

The inspector permitted the mine to reopen about 30 minutes after its closure when he modified the order for the first time. The modification required Nacco to devote at least 25 manshifts per week to rehabilitating the escapeway until the work was completed. 3/ The modification allowed Nacco to continue its usual mining operations in the north mains while the work of rehabilitating the intake escapeway was being conducted. After the issuance of this modification, normal mining operations resumed, all previously withdrawn miners returned to work, and Nacco thereafter devoted at least 25 manshifts per week to rehabilitating the escapeway. MSHA modified the order for the second time on December 11, 1984, to add an additional thousand feet to the length of escapeway needing rehabilitation. On January 18, 1985, MSHA modified the order for the third time to reduce its estimate of the number of workers affected by its issuance.

On January 25, 1985, the State of Ohio Department of Mines conducted an inspection of the mine, found that the escapeway violated Ohio's mining laws, and issued an order to Nacco requiring that Nacco continue to devote the MSHA-imposed 25 manshifts per week to the rehabilitation efforts. On March 22, 1985, the state issued another order to Nacco, requiring some relocation of the route of the escapeway and continuance of the rehabilitation effort.

On October 2, 1986, about 22 months after the initial issuance of the withdrawal order, different MSHA inspectors determined that the violation of section 75.1704 had not been abated and that the time for abatement should not be further extended. (MSHA inspection responsibility for the Powhatan No. 6 Mine had been transferred as of April 1, 1986, from MSHA's Vincennes, Indiana, office to its Morgantown, West Virginia, office.) At this time, MSHA issued a fourth modification of the order to Nacco requiring that the intake escapeway and all active sections inby be closed and ordering the withdrawal of miners because the escapeway was alleged to still be in violation in several locations.

Nacco was able to continue mining operations without idling any

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> Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escapeway shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

3/ "Manshift" is defined in part as, "The ... work done by a man in one shift." Bureau of Mines, U.S. Dep't of the Interior, A Dictionary of Mining, Mineral, and Related Terms 679 (1968).

miners during the shift on which the modification was issued and for the rest of that work week by relocating the affected workforce to another area of the mine. However, during the following work week, on October 6, 7 and 8, 1986, Nacco laid off the 87 complainants as a result of the idling effect of the modification. On October 8, 1986, MSHA determined that the violative conditions had been corrected to a degree that would allow mining to resume, and it again modified the order to provide that the escapeway and the north mains could be reopened. At that time the miners were recalled.

Section 105(d) of the Mine Act provides that an operator or representative of miners may contest the issuance or modification of an order issued under section 104 of the Act within 30 days of receipt of the order or modification and that an operator may also contest the Secretary's proposed assessment of a civil penalty within 30 days of receipt. 4/ Neither Nacco nor the United Mine Workers of America ("UMWA"), the representative of the miners at the Powhatan No. 6 Mine, contested the initial issuance of the withdrawal order or any of the subsequent modifications of the order. Further, on May 7, 1985, Nacco, without contest, paid the civil penalty of $500 proposed by MSHA for the violation of section 75.1704 alleged in the withdrawal order.

4/ Section 105(d) states in part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section [104] of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section [104] of this [Act], or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section [104] of this [Act], or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section [104] of this [Act], the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance....

30 U.S.C. § 815(d).

On December 8, 1986, the United Mine Workers of America ("UMWA") filed the subject compensation complaint against Nacco to obtain compensation under the third sentence of section 111 for the complainants. The complaint alleged that the 87 complainants were idled on October 6, 7, and 8, as the result of the October 2, 1986, modification of the withdrawal order and, therefore, were entitled to compensation. Nacco answered, admitting that the order and modification were issued but denying that the complainants were entitled to compensation. In a motion for summary decision and in oral argument before the administrative law judge, Nacco asserted that section 111 does not provide a right to compensation for miners idled by a modification of a withdrawal order and, in any event, that the order and the modification requiring closure of the intake escapeway were invalid. Responding with a cross-motion for summary decision, the UMWA contended that the requirements for an award of compensation under the third sentence of section 111 were met because the withdrawal order had been issued under section 104 of the Act for a violation of a mandatory safety standard and the order and modifications were final because of Nacco's failure to contest them in a timely manner.

The judge granted summary decision for the complainants. The judge observed that in compensation cases arising under the first or second sentences of section 111 (n.1 supra), a compensation claim can proceed to hearing immediately because the miners' rights to compensation are independent of any subsequent review of the validity of the order upon which the claim is based. 9 FMSHRC at 1352-53. In contrast, a compensation claim under the third sentence of section 111 may not be heard until the order upon which the compensation claim is based has become final. (The third sentence of section 111 states, "all miners who are idled due to ... [an] order [issued under section 104] shall be fully compensated after all interested parties are given an opportunity for a public hearing ... and after such order is final.") 9 FMSHRC at 1353. The judge reasoned that under the Act an order issued pursuant to section 104 becomes final either upon being upheld in a contest proceeding under section 105(d) of the Act or upon the operator's waiver of its section 105(d) contest rights. Id. The judge stated, "If the ... order [is] not challenged it is, as a matter of law, final and not subject to further review." Id. He determined that the finality of the violation of section 75.1704 was established when Nacco paid the civil penalty for the violation of section 75.1704 and that the order and modifications became final when neither Nacco nor the UMWA contested them within 30 days of their issuance. Id.

The judge concluded that in the compensation proceeding Nacco was "statutorily barred from contesting the validity of the order, its four modifications, and the charge of a violation of 30 C.F.R. 75.1704" and, therefore, that its arguments attacking the validity of the October 2, 1986 modification could not be heard. 9 FMSHRC at 1353. The judge noted that Nacco had conceded that the miners were laid off as a result of the October 2, 1986, modification. Accordingly, he awarded compensation to the miners for wages lost on October 6, 7 and 8, 1986, and he also awarded interest, to be computed from October 8, 1986, until paid. 9 FMSHRC at 1353-54. In a Supplemental Decision, he awarded the complainants $30,424.08 in compensation plus interest. 9 FMSHRC

at 1671-74.

We granted Nacco's petition for discretionary review. 5/ At Nacco's request, we stayed briefing pending our resolution of two cases posing similar or related issues, Loc. U. 2333, UMWA v. Ranger Fuel Co., 10 FMSHRC 612 (May 1988) and Clinchfield Coal, supra. Following issuance of Clinchfield, we dissolved the stay and the parties filed briefs. On review, Nacco reiterates the arguments that it made to the judge that a modification of an order does not entitle miners to compensation under section 111 of the Act and that, in any event, the order and modification in this case are invalid and cannot support a compensation award.

We reject Nacco's contention that a modification of a withdrawal order may never support a compensation claim under section 111. The third sentence of section 111 states that the right to compensation arises when a mine or an area of a mine is closed by an "order" issued under sections 104 or 107 of the Act. The Act expressly contemplates that such orders may be modified: all citations and orders issued by the Secretary under section 104 are subject to modification by the Secretary, the Commission, or the courts. 30 U.S.C. §§ 814(h) & 815(d). Depending upon the nature of the modification, the substantive effect of the underlying enforcement action may or may not be changed but the enforcement action nevertheless remains in effect as modified. See, e.g., Southern Ohio Coal Co., 10 FMSHRC 138, 143-144 (February 1988).

Section 104(h) of the Act provides that any citation or order issued under section 104 shall "remain in effect until modified, terminated or vacated by the Secretary ..., the Commission or the courts...." 30 U.S.C. § 814(h). Modification differs from termination or vacation. Termination occurs when the Secretary determines that the condition cited has been abated; vacation occurs when either the Secretary, the Commission, or a court concludes that the citation or order as issued or modified is null and void. Thus, the language of section 104(h) that states that a citation or order issued under section 104 "shall remain in effect until modified" does not necessarily mean that the original citation or order ceases to have any effect following modification, as Nacco suggests. Rather, the original citation or order remains in effect, as modified.

Nacco contends that the lack of mention of "modification" in section 111 is not an oversight but rather is reflective of MSHA's lack of authority to close mines or idle miners by issuing modifications of extant orders. Nacco notes that Webster's New Collegiate Dictionary 763 (1986) defines "modify" as "1: to make less extreme ... moderate; 2: to

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5/ Subsequent to our direction for review, the Powhatan No. 6 Mine was acquired by Ohio Valley Coal Company. In its brief, the operator states that Ohio Valley now "carries on the litigation as the responsible operator." Op. Br. 1 n. 1. In the absence of any formal request for substitution and amendment of the case caption, we retain the existing caption and continue to refer to the operator as "Nacco" in this decision.

limit or restrict the meaning of...." Nacco further argues that in Dart v. United States, 848 F.2d 217 (D.C. Cir. 1988), the Court determined in an analogous context that the term "modify" refers to a narrowing, not a broadening, effect. Thus, according to Nacco, MSHA was not authorized to modify the withdrawal order in issue, which had not been idling miners, to provide that miners would be withdrawn.

This case does not require us to decide whether all instances of modification of withdrawal orders leading to the idling of miners can support compensation under section 111. However, in general, we reject Nacco's restrictive interpretation of the power of modification under the Mine Act and the operator's correspondingly technical interpretation of section 111. Modifications of citations or withdrawal orders often expand the scope of the original enforcement action. For example, the second modification of the original withdrawal order here, of which Nacco does not complain, enlarged the order's scope to cover an additional one thousand feet of escapeway requiring rehabilitation.

Further, in ordinary usage, the word "modify" includes not only a sense of moderation (as Nacco would circumscribe the term) but also a sense of alteration -- including basic or important amendments not necessarily confined to moderating change. See, e.g., Webster's Third New Int'l Dictionary (Unabridged) 1452 (1986 ed.)(definition of modify). Similarly, a standard legal dictionary defines "modify" as meaning:

> To alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease.

Black's Law Dictionary 905 (5th ed. 1979). This accepted usage is consistent with a broad, rather than constrictive, view of the modification power under the Mine Act. We find nothing in the Act's language or legislative history indicating that Congress intended to confine modification only to a narrowing sense.

The D.C. Circuit's opinion in Dart, supra, upon which Nacco relies, does not contradict this conclusion. In that case arising under the Export Administration Act ("EAA"), the Court overturned the Secretary of Commerce's reversal of an administrative law judge's export licensing decision on the grounds that the Secretary's act of reversal was not authorized by the EAA's administrative review provisions, which permitted the Secretary only to affirm, modify, or vacate such orders. 848 F.2d at 227-30. In reaching this conclusion, the Court stated:

> It is clear that the common usage of the word "modify" does not describe the Secretary's action in this case. The dictionary's first meaning of "modify" is "to make more temperate and less extreme." Webster's Third New International Dictionary 1452 (Merriam-Webster ed. 1981). At most, the word means "to make a basic or important change in." Id. (fourth definition). In this case,

> the Secretary did not "temper" or even "make a basic change in" the ALJ's decision. Rather, he completely overturned the ALJ's conclusion....

848 F.2d at 228 (emphasis added). The Court expressly acknowledged the alternative sense of modification. In the present proceeding, the underlying withdrawal order was not "overturned" or "reversed" but was altered to require further rehabilitation work.

As relevant here, we hold that, in general, withdrawal orders may be modified by the Secretary to expand, as well as contract, their scope and their terms. Whether a particular modification is proper must be determined on a case-by-case basis under the enforcement review provisions of the Act.

Furthermore, we agree with the judge that having failed to contest the validity of the order and its modifications pursuant to section 105(d), Nacco is barred from raising such challenges in this compensation proceeding. Section 105 of the Act establishes a comprehensive scheme for the review of citations and orders issued pursuant to section 104 of the Act. Section 105(d) (n.4 supra) provides operators with the opportunity to contest the validity of a withdrawal order or modification of a withdrawal order issued under section 104 within 30 days of receipt thereof and to request a hearing. In addition, after a civil penalty is proposed for any violation cited in such order, section 105(a) allows operators 30 days to contest the citation or proposed assessment of civil penalty. 6/

6/ Section 105(a) of the Act provides:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment

Section 105(a) specifically provides that if an operator fails to contest a citation or proposed penalty within 30 days, it shall be deemed a final order of the Commission not subject to review by any court or agency. Further, payment of a proposed civil penalty (except by genuine mistake) extinguishes an operator's right to contest the underlying citation or withdrawal order. See Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985). See also Ranger Fuel, supra, 10 FMSHRC at 617-18; Pocahontas Fuel Co., 8 IBMA 136, 143 (1977). By viewing the contest provisions of section 105 as an interrelated whole, the Commission has consistently construed section 105 to permit substantive review. See e.g., Energy Fuels Corp., 1 FMSHRC 299, 308-309 (May 1979). The compensation provisions of section 111, however, stand apart from the interrelated structure for reviewing citations, orders and penalties created by section 105.

The distinct purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. That section 111 does not provide the basis for collaterally attacking the validity of an order that underlies a compensation claim is plainly revealed by the language of section 111, which, in its first two sentences, affords compensation "regardless of the result of any review" of an order and in its third sentence affords compensation "after such order is final." Thus, the Act contemplates that, for compensation purposes, the validity of the enforcement action upon which a compensation claim is based is either irrelevant or has already been otherwise established.

In Ranger Fuel, supra, we concluded that payment of a proposed civil penalty for an alleged violation precludes an operator from contesting the validity of the violation in a compensation proceeding. 10 FMSHRC at 617-20. We stated that permitting a challenge to the violation "could not be reconciled with the statutory framework of section 105 and 111 of the Mine Act...." 10 FMSHRC at 617. Underlying our decision in Ranger Fuel was a recognition that, in contest proceedings under section 105 of the Act, the Secretary is a party, whereas in compensation proceedings under section 111, only the miners, or their representative, and the operator are parties. We concluded that allowing an operator to challenge in a compensation proceeding the fact of violation despite having paid the resulting civil penalty would improperly place miners and their representatives in a prosecutorial role of establishing the violation. 10 FMSHRC at 619. Accord: Int'l U. UMWA v. FMSHRC, 840 F.2d 77, 81-82 (D.C. Cir. 1988).

In like manner, we conclude here that allowing Nacco to challenge in this compensation proceeding the validity of the Secretary's action in modifying the withdrawal order 22 months after its original issuance so as to cause a further idling of miners necessarily would place miners

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of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

30 U.S.C. § 815(a).

and their representatives in the role of defending, in the Secretary's absence, the validity of the Secretary's enforcement actions. We conclude that under the Mine Act that burden is appropriately imposed on the Secretary in a proceeding triggered by an operator's timely contest of an enforcement action by the Secretary.

Nacco also asserts that the disparity in the time periods allowed for an operator to contest an order or modification under section 105(d) of the Act (30 days) and the time provided under Commission Procedural Rule 35 (30 C.F.R. § 2700.35) for claimants to file compensation claims under section 111 (90 days) offends the public's interest in avoiding enforcement disputes. Op. Supp. Br. 5. Nacco further asserts that the "practical effect of this disparity is simple -- operators often must decide whether to contest an order without notice of whether they will face a compensation claim." Id. We disagree. Section 105(d) and Commission Rule 35 specify the times for requesting a hearing and, although the time frames are different, Nacco had ample notice of its possible section 111 exposure from the fact that miners were withdrawn who lost pay as a result of MSHA's enforcement actions.

Nacco further contends that it had the right to wait to contest the modification until a civil penalty was assessed. Here, however, the civil penalty for the violation alleged in the order had been assessed and paid before the modification was issued. Op. Br. 6. Section 105(d) of the Act (n. 4 supra) provides operators with the opportunity to contest and request a hearing concerning an order of withdrawal or modification of an order issued under section 104 within 30 days of receipt thereof. In addition, after a civil penalty is proposed for any violation cited in such order, section 105(a) (n. 6 supra) allows the operator 30 days to contest the citation or proposed assessment of penalty. Section 105(a) specifically states that if an operator fails to contest a citation or proposed penalty within 30 days, it shall be deemed a final order of the Commission not subject to review by the court or agency. In the present case, Nacco was assessed a penalty of $500 for the violation of 30 C.F.R. § 75.1704, which it paid on May 7, 1985, without contest. As penalties are assessed for violations, and the alleged violation had occurred on December 10, 1984, no new penalty was to be forthcoming for the October 2, 1986, modification as no new violation was alleged in the modification. Since a civil penalty cannot be assessed without a violation, Nacco could not wait for a civil penalty assessment before initiating a contest of MSHA's modification action. Thus, if Nacco truly expected the issuance of another civil penalty assessment in conjunction with the modification, it erred and forfeited its right to contest the modification by failing to file for review in a timely manner under section 105(d). See Old Ben, 7 FMSHRC at 209. Therefore, we hold that because Nacco did not avail itself of the opportunities to contest in a timely manner pursuant to section 105 either the validity of the section 104(d)(2) order, or the penalty proposed for the violation, or the validity of any of the subsequent modifications, it is precluded from raising such challenges here. We emphasize that we do not reach the validity of the Secretary's enforcement actions at the Powhatan No. 6 Mine. The steps taken by the Secretary to achieve compliance with section 75.1704 were, at least,

open to question. 7/ We are troubled that the operator and the miners allowed such an oscillatory enforcement policy to persist. Nevertheless, there being no dispute in this compensation proceeding concerning the "nexus" between the modified order and the complainants' idlement, we affirm the judge's award of compensation. See, e.g., Ranger Fuel, 10 FMSHRC at 620-21.

Finally, we turn to the question of interest. The judge ordered Nacco to pay a total of $30,424.08 in compensation to the complainants, plus interest computed in accordance with our decision in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042 (December 1983). Although Nacco asserts that complainants awarded compensation under section 111 are not entitled to prejudgment interest, or that if they are so entitled, it is error to compute the interest according to the "quasi-punitive" Arkansas-Carbona formula, it also acknowledges that our Clinchfield decision determines these issues for purposes of this proceeding. Op. Br. at 2 n.2. 8/

In Clinchfield, we concluded that interest may properly be included in a compensation award and that it should accrue from the date that the compensable pay would have been paid but for the idlement until it is tendered. 10 FMSHRC at 1501, 1503. We also approved, effective January 1, 1987, use of the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest, discarding

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7/ In other cases pending before the Commission, the Secretary has recognized the significance of escapeways:

"The presence of adequate escapeways for use by all miners in an emergency is one of the most important of the mandatory safety standards under the Mine Act." Secy.'s Br., Utah Power and Light Co., Docket Nos. WEST 87-211-R, WEST 87-224-R, at 8.

"An adequate escapeway system is crucial for miner safety, and violations involving the maintenance of escapeways thus are extremely serious." Id. 11.

"The statutory standard requiring adequate escapeways from underground coal mines ... and the implementing mandatory standards ... are fundamental safety standards necessary to help prevent injuries and fatalities in the event of underground emergencies. Violations of such standards can have disasterious (sic) results should such an emergency occur." Secy.'s Pet. for Discr. Rev., Rushton Mining Co., Docket No. PENN 88-99-R, at 3.

8/ The judge directed the parties to confer as to the amount of interest owed. The parties, however, could not agree as to whether interest was owed and they offered to submit briefs on the interest issues. The judge did not entertain the parties' offers to submit briefs but, instead, rendered his supplemental decision fixing the amount of the compensation award and interest in accordance with Arkansas-Carbona. Nacco argues that the judge erred in awarding interest without the benefit of the parties' memoranda of law on the subject. Although allowing the briefs may have been the preferred procedure, we see no error on the judge's part and note that Clinchfield resolves the substantive interest issues.

for periods commencing after December 31, 1986, use of the adjusted prime rate previously approved in Arkansas-Carbona. 10 FMSHRC at 1504-06. Therefore, while we affirm the judge's award of compensation and interest, we modify his order regarding the computation of interest by directing that interest be computed as provided in Clinchfield, and 54 Fed. Reg. 2226, supra.

For the foregoing reasons, we affirm the judge's grant of the complainants' motion for summary decision and his award of compensation and prejudgment interest, but we modify the judge's order regarding computation of interest.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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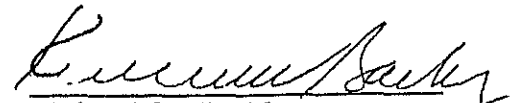
July 20, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	Docket No. WEVA 87-272
BIRCHFIELD MINING COMPANY	:	

ORDER

By order dated July 6, 1989, the Commission granted the Secretary of Labor and the United Mine Workers of America until July 14, 1989, within which to respond to the renewed motion to dismiss and offer of judgment of Birchfield Mining Company ("Birchfield") or to submit with Birchfield a joint motion for approval of settlement. On July 17, 1989, the Secretary's Joint Motion for Approval of Settlement was hand-delivered to the Commission along with the Secretary's Motion for Leave to File Joint Motion One Day Out of Time. Upon consideration of the latter motion, it is granted and the Joint Motion for Approval of Settlement is accepted for filing this date.

For the Commission:



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ADMINISTRATIVE LAW JUDGE DECISIONS

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JUL 7 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL ALBERT SWINNEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 89-172-DM
	:	MD 88-51
	:	Morenci Mine
v.	:	
JAMES HAMILTON CONSTRUCTION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached an amicable resolution of this matter. The terms of the agreement are that Complainant, in return for the payment of $1,000.00, agrees to dismiss this matter. Complainant also waives civil penalties.

In the premises, the settlement appears appropriate and is approved. Accordingly, if it has not previously done so, Respondent is ordered to pay Complainant the sum of $1,000.00 in accord with the settlement agreement immediately upon receipt of this decision. It is further ordered that upon such payment these proceedings be deemed dismissed with prejudice with each party to bear his(its) own costs.

/Michael A. Lasher Jr.
Michael A. Lasher
Administrative Law Judge

Distribution:

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JUL 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 89-56-M
	:	A.C. No. 16-00970-05614-A
v.	:	
	:	Morton Salt Weeks Island Mine
TONY CHANEY, Employed by MORTON SALT DIVISION/ MORTON THIOKOL INC.,	:	

DEFAULT DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent Tony Chaney pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). The petitioner seeks a civil penalty assessment in the amount of $400, against the respondent for an alleged knowing violation of mandatory safety standard 30 C.F.R. § 57.9003, as noted in a section 104(d)(2) Order No. 2866484, issued on August 25, 1987, at the Weeks Island Mine operated by Morton Thiokol, Inc., in New Iberia, Iberia Parish, Louisiana. According to the proposal filed by the petitioner, the respondent was employed at this mine as a mine maintenance supervisor, and was acting in that capacity at the time the order in question was issued.

The pleadings in this case reflect that copies of the petitioner's proposed civil penalty assessment were served on the respondent by certified mail on March 16, and 24, 1989, and the return certified mailing receipt from the U.S. postal service reflects that the respondent received the proposed civil penalty assessment notification on March 27, 1989. However, the respondent failed to file an answer to the civil penalty assessment proposal as required by Commission Rule 28, 29 C.F.R. § 2700.28.

In view of Mr. Chaney's failure to file an answer, I issued an Order to Show Cause on May 22, 1989, directing him to explain why he should not be held in default and immediately ordered to pay the proposed civil penalty assessment for his failure to file an answer to the civil penalty assessment proposal filed against

him by the petitioner. The order further directed Mr. Chaney to respond within ten (10) days. The return certified mailing receipt from the U.S. Postal Service reflects that Mr. Chaney received my order on May 24, 1989. However, as of this date, he has not responded.

Discussion

The applicable Commission Rules in this case provide as follows:

29 C.F.R. § 2700.28

§ 2700.28 Answer.

> A party against whom a penalty is sought shall file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested.

29 C.F.R. § 2700.63

§ 2700.63 Summary disposition of proceedings.

> (a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.
>
> (b) Penalty proceedings. When the judge finds the respondent in default in a civil penalty proceeding, the judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

The record in this case establishes that the respondent was served with copies of the petitioner's proposal for assessment of civil penalty for the alleged violation in question and that he has failed to file a timely answer. In addition, he has failed to avail himself of an opportunity to explain why he did not file a timely answer, and he was advised of the consequences of his failure to do so. He has also failed to respond to my show cause order where he was specifically advised that his failure to respond and file an answer would place him in default. Under the circumstances, I conclude and find that the respondent Tony Chaney is in default and has waived his right to be further heard in this matter. I see no reason why the petitioner's proposed civil penalty assessment of $400 should not be affirmed and a

final order entered assessing this penalty against Mr. Chaney as the final order of the Commission.

ORDER

Pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, judgment by default is herewith entered in favor of the petitioner, and the respondent Tony Chaney IS ORDERED to immediately pay to MSHA the sum of $400, as the final civil penalty assessment for the violations in question.

George A. Koutras
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mr. Tony Chaney, 4121 Hill Top, Brunswick, OH 44212 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-313
	:	A.C. No. 46-03805-03863
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether the Southern Ohio Coal Company (SOCCO) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations or orders.

The case was heard in Morgantown, West Virginia on February 2, 1989. Both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record in making this decision.

Prior to the hearing, petitioner filed a motion for partial decision and order approving settlement that would dispose of four out of the five citations/orders involved in this docket. A reduction in penalty from $4,050 to $3350 is proposed for those four only. I have considered the representations and documentation submitted by motion in this case, and have concluded that the proffered settlement is appropriate under the statutory criteria set forth in section 110(i) of the Act. I so

Considering the criteria in section 110(i) of the Act, $1500 is an appropriate penalty for the violation.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citations 3228886, 3228887 and 3228988 are AFFIRMED.

2. Orders 3228563, 3228564 and 3227686 are AFFIRMED.

3. Respondent shall within 30 days of the date of this decision pay the following civil penalties for the violations found:

CITATION OR ORDER		PENALTY
3228886		$1400
3228887		1400
3228988		1000
3228563		800
3228564		800
3227686		1600
	TOTAL	$7000

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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JUL 31 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 88-59-M
	:	A.C. No. 54-00289-05503
v.	:	
	:	Docket No. SE 89-23-M
DILLINGHAM CONSTRUCTION INTERNATIONAL, Respondent	:	A.C. No. 54-00289-05504
	:	Cerrillos Dam Project

DECISIONS

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Anibal Irizarry, Esq., McConnell, Valdes, Kelley, Sifre, Griggs & Ruiz-Suria, San Juan, Puerto Rico, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for nine alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely contests and answers, and hearings were held in San Juan, Puerto Rico. The parties filed posthearing briefs, and their respective arguments have been considered by me in the course of my adjudication of the cases. I have also considered the oral arguments made by the parties at the hearings.

Issues

The respondent takes the position that it is a construction contractor, who at the time of the MSHA inspections in question, was engaged in the process of constructing a dam pursuant to an agreement with the Government of Puerto Rico and the U.S. Corps of Engineers. Respondent denies that it operates a "mine" within the jurisdiction of the Act, and asserts that its work associated with the dam project in question is within the enforcement

jurisdiction of the Commonwealth of Puerto Rico Occupational Safety and Health Administration (hereinafter PR-OSHA).

The respondent maintains that any minerals taken and used in the construction of the dam have been "excavated" rather than "extracted," and that it does not engage in any "mining or milling" activities which would bring its construction activities within the jurisdiction of the Act, and within MSHA's mine enforcement jurisdiction. In support of its position, the respondent relies on an MSHA/OSHA Interagency Agreement, and several MSHA policy directives issued with respect to this agreement.

Assuming that the respondent is subject to the Act and to MSHA's enforcement jurisdiction, the additional issues presented are (1) whether the respondent violated the cited standards, and if so, the appropriate civil penalties which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act; and (2) whether several of the alleged violations were "significant and substantial" (S&S).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1, et seq.

3. Part 56, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following:

1. The respondent's size consists of 102,559 man-hours worked per annum.

2. The respondent's history of prior violations consists of 10 assessed civil penalty assessments made by MSHA in 1987.

3. Payment of the proposed civil penalty assessments for the violations in issue in these proceedings will not adversely affect the respondent's ability to continue in business.

Discussion

All of the contested section 104(a) citations in these proceedings were issued by MSHA Inspector Roberto Torres Aponte, after the completion of his inspection of the dam site in question on August 31 and September 1, 1987. Although the citations

are dated September 1, 1987, Inspector Torres confirmed that he actually wrote them on September 2, 1987, the day following his inspection, and that he served them on respondent's representative Ike Tabor during a close-out conference held that day. Mr. Torres further confirmed that during the course of his inspection he discussed each of the cited conditions with Mr. Tabor and informed him of the violations and the fact that he would issue the citations. Mr. Torres further explained that his normal procedure is to write up and serve any citations on the mine operator at the conclusion of his inspection and during the close-out conference. The citations issued by Mr. Torres are as follows:

Docket No. SE 88-59-M

Non-"S&S" Citation No. 2858999, 30 C.F.R. 57.14001. "The No. 3 feeder motor belts were not guarded, maintenance is done in the area where the equipment is shutted (sic) off."

"S&S" Citation No. 2859000, 30 C.F.R. § 56.11002. "The walkway around the No. 3 feeder was not provided with hand rails around it exposing maintenance employees to fall from approx. 12 ft. to the lower level. Three employees were working in the area."

"S&S" Citation No. 2859001, 30 C.F.R. § 56.14001. "The No. 5 conveyor belt counterweight pulley was not guarded. It is located near the walkway where persons walk and are exposed to become caught between the belt and pulley."

Non-"S&S" Citation No. 2859002, 30 C.F.R. § 56.11002. "The No. 6 feeder platform was not provided with handrails. The area is not used on a regular basis."

Non-"S&S" Citation No. 2859003, 30 C.F.R. § 57.14001. "The No. 7 conveyor belt tail pulley was not guarded. Cleaning and maintenance is done in the area when the equipment is shutted (sic) off."

"S&S" Citation No. 2859004, 30 C.F.R. § 56.9007. "The No. 8 conveyor belt emergency stop cord was broken loose exposing the persons who walk in the walkway to the hazard. The walkway is used on a regular basis by employees."

Non-"S&S" Citation No. 2859005, 30 C.F.R. § 56.14001. "The No. 9 conveyor belt tail pulley was not guarded. Cleaning and maintenance is done in the area when the equipment is shutted (sic) off."

Non-"S&S" Citation No. 2859006, 30 C.F.R. § 56.14001. "The No. 10 conveyor belt counterweight pulley was not guarded.

Cleaning and maintenance is done in the area when the equipment is shutted (sic) off."

Docket No. SE 89-23-M

"S&S" Citation No. 2859007, 30 C.F.R. § 56.15003. "Several employees were not wearing safety shoes in the rock plant, being exposed to have feet injuries or fractures."

Petitioner's Testimony and Evidence

Inspector Torres testified with respect to his training and experience, and he confirmed that he has served as an inspector for 11 years, and was previously employed at a cement plant for 8 years. He confirmed that in response to a September 22, 1986, letter from the respondent's Project Manager Lars Johansson, requesting a "CAV" or compliance assistance visit, he visited the "extraction area" at the dam construction site on November 4, 1986. Mr. Torres explained that such visits are normally made while an operator is making equipment adjustments, but before the start of any full production. During the visit in question, Mr. Torres inspected all of the equipment at the site, and discussed with mine management several violative conditions concerning equipment guarding, berms, safe access, walkways, safety shoes, and handrails, and made recommendations concerning corrective action.

Mr. Torres stated that the conditions he found during his initial CAV inspection were "Non-civil penalty violations" for which the respondent was given a reasonable time to correct before an MSHA inspector returns to the site for a regular inspection.

Mr. Torres stated that during his CAV inspection he found that limestone was being extracted by the respondent by blasting. The limestone was then trucked to the primary crusher and screening plant where it was sized or separated into smaller rock by means of two grizzles. The processed materials were then used in the construction of the dam. Mr. Torres stated that the primary crusher operation and extraction area were located approximately 1,500 feet from the actual dam construction site, and that the screening station was approximately 200 feet from the primary crusher.

Mr. Torres stated that the respondent used explosives, bulldozers, front-end loaders, haulage trucks, primary crusher and screening conveyor belts, and two grizzles during the limestone extraction and processing activity. He stated further that a conveyor belt located at the primary crusher transferred the excavated limestone and rock to the screening station where four screens were used to separate small stones from the larger ones, and that the resulting crushed rock was used in "layers" to

construct the dam. He also confirmed that some of the processed materials were used to produce concrete or sand, and that all of the materials were ultimately used for in the construction of the dam.

In addition to the excavated rock and limestone which was processed at the dam construction excavation area, Mr. Torres stated that the respondent used raw materials which it purchased from other area quarries for the construction of the dam. He described this material as "white marble-like stone" which was not excavated at the same site, and he confirmed that it was "trucked in." He determined that these other materials were brought to the site through visual observation of the material which was stockpiled at the excavation area of the dam construction site.

Mr. Torres characterized the work being performed at the excavation area in question as a milling operation, and he confirmed that according to an MSHA report which was filed by the respondent, 32 of the respondents' employees were engaged in work connected with this milling operation. He did not know the total number of employees who were working at the site.

Mr. Torres identified the bulldozers used by the respondent as Caterpillar "cats" or "dozers," and he confirmed that the other equipment which he previously identified, including the bulldozers, were all manufactured outside of Puerto Rico in "the states."

Mr. Torres stated that subsequent to his initial CAV inspection, he next visited the dam construction excavation area on February 9 and 10, 1987, to conduct a regular inspection. The first day he was alone, and the second day he was accompanied by MSHA Inspector Augusto Perez. During these visits, Mr. Torres confirmed that he observed the same milling activities, i.e., limestone extraction, crushing, and screening, and they were similar to the activities taking place during his prior CAV inspection.

Mr. Torres stated that during his inspection of February 9 and 10, 1987, he issued several citations to the respondent, and after proposed civil penalty assessments were made by MSHA for these violations, the respondent paid the assessments and the citations were terminated.

Mr. Torres stated that his next visit to the dam excavation area took place on June 29, 1987, when he went there for a "compliance follow-up inspection" to ascertain whether the prior violative conditions were corrected by the respondent. At this time only the primary crusher was in operation, but a new secondary crushing plant was being constructed by the respondent in

order to produce finer rock material to be used in the construction of the dam.

Mr. Torres stated that he next visited the dam excavation area on August 31, and September 1, 1987, when he conducted another regular inspection. He inspected the primary crusher and screening plant, and conducted noise sampling surveys on some of the equipment. Since the secondary crushing plant was still under construction, he did not inspect it. Mr. Torres confirmed that Mr. Ike Tabor, the respondent's "excavation area" manager, accompanied him during the inspection and that he discussed each of the citations which he issued with Mr. Tabor.

Mr. Torres confirmed that subsequent to his inspections of August 31, and September 1, 1987, he held a "closing conference," with Mr. Tabor, Mr. Johansson, MSHA Inspector Brian Smith, and the respondent's project safety engineer Gerald R. Fulghum, and that Mr. Fulghum advised him that the equipment guards which were the subject of Citation Nos. 2858999, 2859003, 2859005, and 2859006, had been removed in order to be repaired, but that the repair work had not been completed and the guards were not replaced. Mr. Fulghum subsequently mailed in a "note" to his office explaining the circumstances under which the guards had been removed.

Citation No. 2858999

Mr. Torres stated that the cited feeder motor belts were located at the third level of the primary screen station. The motor is used for the vibrating screens, and employees need to be there on a daily basis to clean any spillage from the floors. Access to the cited location is by means of a ladder way. Mr. Torres confirmed that he observed the condition at 8:30 a.m., on September 1, 1987, and that the plant was not in operation at that time, and the motor was shutdown. The plant was put in operation between 11:00-11:30 a.m.

Mr. Torres stated that he made a gravity finding of "unlikely" because the plant is shutdown and locked out when clean-up or maintenance work is performed. Although he observed no one at the cited location, Mr. Torres believed that at least one individual would be in the area for inspection once the plant was started up. In the event someone were to be caught in the unguarded motor belts, they could lose a finger or an arm or suffer disabling injuries.

Mr. Torres confirmed that he made a negligence finding of "moderate" because he believed that a supervisor should have been aware of the unguarded belts, and similar belts in the plant were guarded. Mr. Torres did not believe the violation was "significant and substantial" because the plant was shutdown when cleanup

or maintenance was performed. He also confirmed that the citation was terminated at a later time by another inspector.

Citation No. 2859000

Mr. Torres stated that the cited feeder walkway was located at the third level of the screening station tower, and that it was elevated approximately 12 feet above the next lower level. Mr. Torres stated that plant manager Ike Tabor, who accompanied him during his inspection, informed him that the platform where the walkway was located was constructed for the purpose of maintaining the No. 3 feeder, but that handrails were not installed.

Mr. Torres confirmed that when he observed the condition at 8:10 a.m., the plant was down and the feeder was not in operation. He observed three employees in the area performing clean-up and maintenance work, and Mr. Tabor informed him that they were employees of the respondent.

Mr. Torres confirmed that he made a gravity finding of "reasonably likely" because someone could fall off the elevated unguarded platform at any time, and if they did, they would likely suffer fatal injuries. He believed the violation was "significant and substantial" because of the high probability of an accident which could result in a fatality.

Mr. Torres confirmed that he made a negligence finding of "moderate" because similar platform areas were guarded with handrails and this should have alerted a supervisor of the need to provide the required handrails.

Citation No. 2859001

Mr. Torres stated that the cited No. 5 conveyor belt counterweight pulley was not guarded when he observed it at 8:30 a.m. The belt was used to transport material and it was elevated and located approximately 20 to 25 feet above ground. A walkway was next to the unguarded pulley, and the unguarded area was approximately 8 inches from the edge of the walkway. Employees would regularly walk by the unguarded pulley because the walkway provided an access way to the transfer point behind the pulley.

Mr. Torres confirmed that the plant was shutdown and the belt was not in operation when he observed the condition. However, once the plant is put into operation at approximately 11:00 a.m., employees would regularly be using the walkway adjacent to the unguarded pulley. Given the fact that the pulley was 36 inches long and 12 to 15 inches wide, experience has shown that accidents have occurred when employees are caught in an unguarded pulley of that size.

Mr. Torres stated that he made a gravity finding of "reasonably likely" because of the likelihood of an accident and injury once the equipment was put in operation, and at least one person who regularly travels the walkway from one side of the pulley to the other would be exposed to the hazard. Mr. Torres also confirmed that he made a finding that the violation was "significant and substantial" because someone could have been caught in the pulley, and if this occurred, a fatality would occur.

Mr. Torres stated that the plant area was "practically new," and that Mr. Tabor informed him that a guard had previously been provided for the pulley in question, but that it was removed for some reason. Mr. Torres stated that he based his "moderate" negligence finding on the fact that similar equipment parts in the area were guarded, and a supervisor should have known that the cited pulley in question needed to be guarded.

Citation No. 2859002

Mr. Torres stated that the No. 6 feeder platform located at the second level of the secondary crusher plant was not provided with handrails. The platform was approximately 10 feet above the second level floor, and it was used to provide maintenance for the shakers located on the platform. He stated that the shakers were located in the middle of the platform area, and that any employee performing maintenance on the shakers would be "far away" from the edge of the perimeter of the unguarded platform.

Mr. Torres stated that employees would not normally be on the platform on a regular basis, and although the platform was located in a new plant area which had not been totally completed, the cited area was located in a plant area which was in production.

Mr. Torres confirmed that he made a gravity finding of "unlikely" because of the low probability of an accident. He explained that any maintenance work on the feeder would be performed in the middle of the platform where the feeder was located, and that the feeder was approximately 10 feet from the edge of the platform. The only reason for anyone going to the platform would be to perform maintenance work, and even if someone were to fall from the platform, they would fall into the "soft" material below and would not likely be injured.

Mr. Torres believed that the violation was not "significant and substantial" because it was not probable that anyone performing maintenance work on the platform would fall off, and it was unlikely that an accident or injury would occur. He confirmed that he made a negligence finding of "moderate" because similar platform areas were provided with handrails.

Citation No. 2859003

Mr. Torres stated that the No. 7 conveyor belt tail pulley located at the secondary crusher plant was not guarded. He explained that the pulley was located approximately 1 foot from the floor level and under the No. 6 feeder which discharged material on the No. 7 belt conveyor. A guard had previously been provided, but it had been removed and not replaced. The plant was shutdown when he observed the condition, and he confirmed that employees are not regularly in the area, except when the belt is shutdown for maintenance work such as alignment or greasing.

Mr. Torres stated that he based his gravity finding of "unlikely" on the fact that the plant equipment is shutdown when maintenance or cleaning work is performed. However, if someone were to be caught in the unguarded pulley, which was 36 inches long and 10 to 12 inches in diameter, they would suffer fatal injuries, and past experience with similar unguarded pulleys attest to this fact. He believed that "sooner or later" someone would have to go to the area while the equipment is running, and they would be exposed to a hazard of being caught in the pulley. One maintenance person would be exposed to the hazard.

Mr. Torres confirmed that the violation was not "significant and substantial," and that he based his negligence finding of "moderate" on the fact that a supervisor should have noticed the unguarded pulley during the preshift examination.

Citation No. 2859004

Mr. Torres stated that the broken No. 8 conveyor belt stop cord was located at the secondary plant. There were two conveyor belts at the cited location, the No. 7 and No. 8, and the No. 8 belt was on the left side. The stop cord was approximately 100 feet long, and it was broken in the middle and lying on the walkway which was adjacent and parallel to the belt. Both the belt and walkway were inclined, and the walkway was regularly used by employees to go from ground level to the crusher.

Mr. Torres stated that the belt was in operation when he observed the broken stop cord, but that no employees were in the area. However, he believed that prior to the start of the operation, one person had walked by the cited area while going to the cone crusher.

Mr. Torres stated that he based his gravity finding of "reasonably likely" on the fact that the walkway was used regularly when the plant was in operation and the broken stop cord would not allow the conveyor belt to be shutdown in the event of an emergency or breakdown. If this were to occur, employees would be exposed to a hazard from the materials on the belt.

Mr. Torres believed the violation was "significant and substantial" because of the likelihood of an accident resulting from the inability to stop the conveyor because of the broken cord. Employees would normally use the walkway to check on the equipment.

Mr. Torres confirmed that he based his negligence finding of "moderate" on the fact that the supervisor should have been aware of the broken stop cord, and as he previously stated, someone walked by the area prior to the start of the operation.

Citation No. 2859005

Inspector Torres stated that the cited unguarded No. 9 conveyor belt tail pulley was located at the secondary crusher plant. The belt was under the cone crusher at ground level, and Mr. Tabor advised him that a guard had been in place but that it had been removed.

Mr. Torres confirmed that employees would be in the area for clean-up and maintenance work, but that the belt would be shutdown when this work was being done. He observed no employees in the area, and never observed any maintenance or clean-up work being performed.

Mr. Torres described the pulley as 24 inches long and 10 to 12 inches in diameter. He did not believe that the violation was "significant and substantial" because the equipment was shutdown, and he made a gravity finding of "unlikely" because maintenance and clean-up work is performed only when the plant and equipment is shutdown.

Mr. Torres confirmed that he made a negligence finding of "moderate" because he believed that a supervisor should have been aware of the fact that the belt pulley was not guarded. Mr. Torres also indicated that past experience has shown that fatalities have occurred when anyone is caught in such an unguarded pulley.

Citation No. 2859006

Mr. Torres stated that the cited unguarded No. 10 conveyor belt counterweight pulley was located at the secondary plant and that the belt travelled from the feeder hopper to the washing and screening station. There was a walkway next to the belt and employees would use it while performing maintenance work.

Mr. Torres stated that the equipment was shutdown when he observed the condition, and that it is shutdown when clean-up or maintenance work is performed. Mr. Torres stated that he made a gravity finding of "unlikely" because the equipment is shutdown when work is being performed, and the walkway is not used on a

regular basis. He also indicated that if anyone were caught in such an unguarded belt pulley, a fatality could occur. Mr. Torres did not believe the violation was "significant and substantial," and he based his "moderate" negligence finding on the fact that similar equipment was guarded.

Citation No. 2859007

Mr. Torres stated that he issued the citation after observing that three employees at the primary rock plant screening tower, and three employees at the secondary plant, were not wearing hard-toed safety shoes. Mr. Torres stated that one employee was wearing tennis shoes, but he did not inspect the shoes, nor did he speak to any of the employees. He confirmed that the employees were wearing hard hats, and that he observed three employees cleaning up under the screening tower. Mr. Torres also stated that Mr. Tabor informed him that the respondent required its employees to wear safety shoes, but that they did not wear them. Mr. Torres was of the opinion that the cited standard required all plant employees to wear safety shoes and that this is the policy interpretation of the standard which is followed in his office.

Mr. Torres stated that he based his gravity finding of "reasonably likely" on his belief that an employee could be struck on the foot by falling rock or material while cleaning up, or by a tool or other equipment while he was performing maintenance work.

On cross-examination, and in response to further questions concerning guarding Citation Nos. 2859001, 2859003, 2859005, and 2859006, Mr. Torres confirmed that at the time he observed the conditions, the equipment was shutdown and not in operation, and he observed no employees who were exposed to any hazards at that particular time. Mr. Torres also confirmed that the plant is shutdown for maintenance at 8:30 a.m., and that production begins at approximately 11:00 a.m. Although the main plant generator was deenergized at the time of his inspection, Mr. Torres did not believe that all of the equipment motors were locked out.

With regard to guarding Citation No. 2858999, Mr. Torres confirmed that he saw no employees in the area. He could not name the employees who were not wearing safety shoes, or the employees who he observed on the walkway of the No. 3 feeder, but he stated that Mr. Tabor informed him that they were employees of the respondent. Mr. Torres also stated that three of the employees without safety shoes were cleaning up, and that the other three were maintenance personnel.

Mr. Torres conceded that the cited standard does not contain the words "safety shoes," and that he assumed that the phrase "suitable protective footwear" means "safety shoes." He also

confirmed that his inspector's manual interpretation of the standard provides that safety shoes means "hard toe shoes" (Tr. 96-97).

With regard to guarding Citation Nos. 2859001, 2859003, 2859005, and 2859006, Inspector Torres confirmed that the plant was not in operation when he viewed the conditions, and he observed no employees in the area of the unguarded equipment. He also confirmed that he did not return to those areas after the plant began operating at 11:00 a.m. (Tr. 106-107).

Mr. Torres confirmed that Plant Manager Tabor informed him that the generator supplying power to the plant was shutdown so that the equipment could not be energized. Mr. Torres also confirmed that the equipment breakers were not locked out (Tr. 121).

With regard to Citation No. 2858999, Mr. Torres confirmed that he observed no employee exposed to any hazard, and he explained that the "persons affected" by the citation were those employee cleaning or performing maintenance, and that "maybe" one of them "could go to that area and injured there" (Tr. 122). Mr. Torres conceded that except for Citation Nos. 2859000 and 2859007, he did not actually observe any employees exposed to any hazards at the time of his inspection, and while he did not know the identity of any of the employees, Mr. Tabor advised him that they were employed by the respondent (Tr. 125-126). Mr. Torres confirmed that all maintenance is performed when the equipment is shut off (Tr. 127), but he believed that safety shoes were still required because employees handle tools and work with heavy machinery, and it could fall on their feet (Tr. 127). He confirmed that Mr. Tabor advised him that the respondent's policy required its employees to wear safety shoes, but that Mr. Tabor did not specify the type of shoes, but did confirm that the shoes the employees in question were wearing were not in compliance with company policy (Tr. 154).

Mr. Torres confirmed that during his close-out conference of September 2, Mr. Johansson and Mr. Tabor did not mention that the equipment guards were being repaired, and would be replaced. Mr. Torres stated that this information came from Mr. Fulghum after the meeting by means of a note which he sent to his office (Tr. 158-161).

MSHA Supervisory Inspector Juan Perez, confirmed that he supervises the MSHA office in Puerto Rico, including all mine inspectors assigned to his office. He stated that he visited the dam site in question as a follow-up to an inspection conducted by Mr. Torres on February 5, 1988, to determine whether the cited conditions were corrected. Mr. Perez further stated that the site was not in operation because of an impending expansion, and

the abatement periods for the citations were extended to May 1, 1988, the date that he was informed the operation would again start. Mr. Perez stated that he next returned to the site on April 21, 1988, and found that most of the citations, except for the safety shoes, were abated. He also confirmed that he had visited the site in September, 1987 (Tr. 177-182).

Mr. Perez stated that during his visits to the site he observed two crusher operations or "plants," one of which he identified as the primary crusher, and one of which he identified as the secondary crusher. In addition to the crushers, he observed a screen, vibrator, and conveyor, and indicated that the secondary plant could be fed by a front-end loader or a conveyor which connected both operations. He also observed materials which had been brought in from other quarries, and these materials were stockpiled between the two plants. He identified the material as a "fixer" which was washed, and ground to produce different sizes, and stated that some of the material was used for the concrete plant (Tr. 184).

Mr. Perez stated that shortly after Mr. Torres' inspection of September 1, 1987, he had a conference with Mr. Fulghum on September 8, at his MSHA office. He stated that Mr. Fulghum questioned the issuance of the citations when the plant was not in operation, and also questioned MSHA's jurisdiction to inspect the dam project (Tr. 185). Referring to his conference report, Mr. Perez stated that Mr. Fulghum agreed with all of the citations except for those pertaining to the lack of guards, and that he stated that the guards were in the machine shop for repairs (Tr. 187).

Mr. Perez stated that he later met with respondent's counsel Irizarry, Mr. Fulghum, and the director of the local OSHA office, Filiberto Cruz, on February 8, 1988. The question of enforcement jurisdiction was discussed at this meeting, and Mr. Perez stated that he placed a phone call to his supervisor, Mr. Claude Narramore, MSHA District Manager in Birmingham, Alabama, and that Mr. Narramore spoke with Mr. Irizarry and informed him that he agreed with Mr. Perez' position that MSHA did in fact have enforcement jurisdiction at the respondent's dam construction site. Mr. Perez stated that he suggested that the respondent put its jurisdictional position in writing in order to submit it to Mr. Narramore, but that this was not done (Tr. 188-194).

Mr. Perez alluded to a call that he received from the Corps of Engineers when the dam project was started inquiring whether or not MSHA had jurisdiction. Mr. Perez stated that he gave an opinion that if the project entailed construction only, MSHA would not have jurisdiction, but if involved milling, it would have jurisdiction (Tr. 194).

Mr. Perez stated that he provided Mr. Irizarry and Mr. Cruz with copies of MSHA Policy Memorandum No. 87-2N-MSHA-OSHA Interagency Agreement, and that he also discussed the memorandum with Mr. Narramore. He confirmed that he advised Mr. Narramore that the respondent was crushing material and buying it from other plants, and that both he and Mr. Narramore agreed that MSHA had jurisdiction in the matter (Tr. 196). Mr. Perez explained Mr. Narramore's position as follows at (Tr. 197):

> Q. Now, did he explain to you, you know according to this memo what would fall under MSHA's jurisdiction and what would not fall under MSHA's jurisdiction?
>
> A. Yes.
>
> Q. And do you recall what he told you about that?
>
> A. Well, in general, we were discussing and he presented an example, like a tunnel, when they building a tunnel, they take the material and they dispose of that material, you know; we don't have any jurisdiction on that. A dam is similar too, if they take the material, the material they have to remove and they dispose of that material, we don't have jurisdiction on that.
>
> Q. OK, now did he explain situations like that where MSHA would have jurisdiction?
>
> A. Yes, he said anything that falls on VH1, milling, it's our jurisdiction.

Mr. Perez confirmed that after the aforesaid meeting, he received nothing further from the respondent regarding the jurisdictional question, and it was not further discussed in his office. He confirmed that his office initially exercised its enforcement jurisdiction after the respondent filed for a mine legal identity number on February 9, 1986, and that he assigned the number to the respondent. The "courtesy inspection" conducted by Mr. Torres followed after the request was received from the respondent (Tr. 202).

Mr. Perez confirmed that his inspectors do not inspect "key cuts," and that the inspectors only inspect the crushing and milling areas. He explained further as follows (Tr. 204):

> A. That is our jurisdiction. I think that in the CAV Roberto went to the extraction area, but the extraction area was in a different place and it was not . . ., extracted from the key cut, that was our information, that it was off side to the area. That was the key and then we have jurisdiction but due to the definition of

key cut, we're supposed to inspect only the primary crusher and down to the final product.

Mr. Perez stated further that on the morning of the hearing in this case he contacted the local OSHA office in Ponce, and spoke with the director, a Mr. Artmayer, who informed him that his office does not inspect the dam project, but that it has visited the site in response to complaints. Mr. Perez stated that Mr. Artmayer informed him that his office does not inspect the respondent's crushers. Mr. Perez produced a copy of his notes with respect to his conversation with Mr. Artmayer, and respondent's counsel Irizzary produced copies of OSHA citations served on the respondent by the Ponce OSHA office (Tr. 207-208).

On cross-examination, Mr. Perez confirmed that MSHA's contact with the dam project resulted from a telephone call in 1985 from the Corps of Engineers inquiring as to MSHA's jurisdiction. Mr. Perez stated that he informed the Corps that MSHA only had jurisdiction over milling, and that after the project began, he determined that MSHA had jurisdiction and suggested that the respondent file for a mine ID number (Tr. 214).

Mr. Perez stated that while on an inspection at the respondent's new Number 2 plant, he observed materials brought from other areas being processed at the plant. He confirmed that this "process" involved "washing, classifying and they were grinding too" (Tr. 215). Mr. Perez stated that the respondent was a responsible employer in terms of safety, and has reasonably complied with the safety regulations and maintained a safe place for employees (Tr. 221).

Respondent's Testimony and Evidence

Gerald R. Fulghum, respondent's Project Safety Engineer, Cerrillos Dam Project, Ponce, Puerto Rico, testified with respect to his education and mining experience, and he confirmed that the respondent was engaged to construct the Cerrillos Dam Project in accordance with the specifications and requirements of the U.S. Army Corps of Engineers. He confirmed that he holds a degree in mining engineering, and stated that the project is a seven million cubic yard dam with a coffer dam and spillway excavation, and he explained the scope of the project by reference to several documents, including the dam contract specifications. He confirmed that the dam in question is part of the Portugues and Bucana Flood Control Plan authorized pursuant to section 201 of the Flood Control Act of 1970, Public Law 91611 (Tr. 229-235).

Mr. Fulghum stated that in the process of constructing the dam in question, the respondent is engaged in the excavation of limestone, rather than extraction, and that the two terms specifically differ in their respective definitions. He explained that

"extraction" is a mining term, and includes "extracting a particular constituent in preference over other," or "a mining process in which you're separating one material from another, from a host." "Extraction," on the other hand, takes place "when the limestone, the principal purpose of the excavation is to procure limestone" (Tr. 235-236).

Mr. Fulghum confirmed that the situs of the dam was determined by the location of the Cerrillos River and the topographical features of the location, which included several varieties of limestone which is used in bulk to form the dam. He stated that all of the limestone materials which are found at the dam site are totally excavated, and there is no stripping of overburden, and no selection process takes place. He further confirmed that the excavated material goes through the plant in its entirety to be used as dam embankment material, and that the respondent is not interested in any mineralization, and that the overriding criteria in the construction of dams is the particle size stability of the material (Tr. 237-239).

Mr. Fulghum stated that the only stripping which takes place is done to remove loose dirt and vegetable matter which causes problems in the final product stability as it is used for the dam construction. Referring to the dam spillway design specifications, Mr. Fulghum made reference to "the blasting of material excavated from the spillway to insure breakage of fractured rock into stable particle sizes." He also stated that the limestone rock can also be ripped with a D-9 ripper, and that any materials used must meet the particle stability criteria for an earth filled dam. He also stated that "a grizzly will be used to process all rockfill and separate it into oversize rock, 3-inch to 20-inch rock and minus 3-inch rock sizes" (Tr. 240).

Mr. Fulghum stated that the respondent must follow the Corps of Engineers instructions and criteria for the construction of the dam, and he confirmed that previously excavated materials has been stockpiled "to be run through our plant." Although the spillway is the major source for the materials used to construct the dam, other associated excavations are used to satisfy the bulk and particle stability sizes for the dam (Tr. 242).

Mr. Fulghum further explained the dam construction criteria, including the "stripping of intensely weathered rock from the surface," and the blasting, excavation, and grizzling of other rock materials (Tr. 242). He stated that materials excavated from the spillway are processed through both of the plant facilities, and while it changes form, "we make no selection process" (Tr. 243).

Mr. Fulghum further explained the criteria for processing coarse filter fill, which he described as "crushed firm and/or sound limestone," and he explained that the processed limestone

must meet the sieve analysis requirements established by the Corps of Engineers contract specifications (Tr. 245). Mr. Fulghum confirmed that all of the firm limestone rock excavated from the spillway must be processed to maintain its particle stability at the sizes in which a core filter or a fine filter is manufactured (Tr. 246).

Mr. Fulghum stated that due to diminishing sources of on-site limestone, the respondent found it necessary to bring in additional materials from off-site. Aggregates such as sand, quarter-inch, half-inch, three-quarter-inch, and 3-inch aggregates is brought to the site, and used to produce concrete for use in the construction of the dam (Tr. 247).

Mr. Fulghum characterized the respondent's plant as "a fill processing plant" and denied that it was a "rock plant," although "in all appearances, shapes and forms it looks like a rock plant" (Tr. 247). He further explained as follows at (Tr. 248, 250):

> The Corps of Engineers, finding that they're running out of limestone rapidly and that two diamond drill studies were not sufficient, says "We would like you to go out to the local quarries and we want you to process their product," and we went to local quarries and said, "We would like to buy your three inch minus," which is a common request of a quarry. "We want . . .," and I . . ., more than 50,000 yards, I can't remember the specific amount. This material is brought on-site and further processed by our filter plant which is also called the terciary plant to make filter.
>
> Once again, everything that goes in that plant, even though it came from outside sources, when it goes into that plant, there is no separation. What goes in the end, comes out the back in one way or another.

Mr. Fulghum stated that the dam site consists of a spillway, a rock plant, and the main dam embankment (Tr. 251). He contended that the respondent is engaged in excavating and processing limestone material which is incidental to the construction of the dam, rather than the dam being incidental to the excavation and processing activity (Tr. 252).

Mr. Fulghum confirmed that MSHA's position is that "because our plant looks like a rock plant it is" (Tr. 254). He agreed that the respondent is excavating the materials to construct the dam, but before using the materials as part of the dam construction, the materials are processed to meet the Corps of Engineers specifications, and he stated further as follows at (Tr. 255-258):

JUDGE KOUTRAS: The application seems to be here, at least from MSHA's point of view, is that you're excavating this material to build the dam, but before you take it from pit to dam, you do something with it.

WITNESS: Yes, sir.

JUDGE KOUTRAS: And you do what you do to it, is you do what the Corps of Engineers tells you to do with it. You . . ., you subject it to some kind of a process to get these specifications, don't you?

WITNESS: Yes, sir, but Your Honor, in the act itself and in the . . ., the memorandums of understanding, just because we're processing rock doesn't make us a miner, doesn't make us a miller. There are exceptions to that, Gypsum. Gypsum is milled at a plant in which Gypsum board is fabricated. Is that a mill? No, they've already found that that's not a mill, Your Honor.

We process material. Because we process material from the earth does not necessarily mean that we're milling. You could . . ., you could make that argument but I think we have to rely on the definitions as we have them before us.

* * * * * * *

JUDGE KOUTRAS: But then when you look over here at milling it's clearly said that MSHA has authority if following, there is a list of general definitions of milling, to which MSHA has authority to regulate, and it says "crushing, sizing," among other things.

WITNESS: Your Honor, we would agree that in order to mill something you must do one of those processes.

JUDGE KOUTRAS: Don't you crush and size?

WITNESS: You crush, size, wash, float, center, benification, solvent extraction, retorting, those are all milling processes, Your Honor. But there's one essential element to milling, milling by technical and legal definition, Your Honor.

JUDGE KOUTRAS: It's what?

WITNESS: You must be separating something valuable from something that's not valuable, and we do not do that.

JUDGE KOUTRAS: But . . .,

WITNESS: Isn't that what it says, Your Honor? Isn't it essential . . .

JUDGE KOUTRAS: What do you mean of value? You know, when you do . . ., when you get a specification that says that the rock for rockfill shall be rock well graded from 100 percent passing a 20-inch-square screen to not more than 5 percent passing a 3-inch screen, aren't you . . ., isn't that the value that you . . ., isn't that what you're getting out of it? You're just not up there ripping stuff out of the earth and piling it against the dam, you're doing something to that under these specifics . . . .

WITNESS: We're screening and sizing, Your Honor.

JUDGE KOUTRAS: That's what I'm saying. Does this . . .

WITNESS: But screening and sizing is a . . ., is a milling operation.

JUDGE KOUTRAS: Then if it's a milling operation, according to this, it's subject to MSHA's jurisdiction?

WITNESS: No, but that . . ., just because this milling does . . ., just because there's sizing it does not make it a milling operation. Just because you're grinding it doesn't make it a milling operation. Those are elements that are required to be a mill. But, if I could refer and the best definition, I totally concur with the definition in the inter-agency agreement, which I don't have the Federal Register copy, but "milling is the art of treating the crude crust of the earth to produce therefrom a primary consumer derivative. The essential operation in all such processes is a separation of one or more valuable considered constituents of the crude from the undesired contaminants from which it is associated."

Referring to topographical photographs of the dam facilities, Mr. Fulghum identified the location of the "rock plant" used for the processing of dam embankment material, and the "terciary plant" used to produce dam filer material, and he confirmed that these are the two plants described by Inspector Torres during his testimony (Tr. 260-261). He confirmed that the excavated materials which are "run through our processing facility" end up in the dam, and that the processed rock is further processed when it is crushed further by passing through a 45-ton

vibratory roller in order to insure stable particle size (Tr. 262).

In response to his interpretation as to what constitutes milling and mining under the Act, and the definition of the term "mill" as found in 30 C.F.R. § 56.2, Mr. Fulghum responded as follows at (Tr. 264-266):

> JUDGE KOUTRAS: Well, let me ask you this, if you look at Section 56.2 of the regulations, you know, in Title 30, the definition of a mill here, that's all on page 305, Mr. Irizarry, I see you've got the green book, it's 56.2.
>
> WITNESS: Uhum?
>
> JUDGE KOUTRAS: 56.2, definitions, I'll give you a minute to find "milling."
>
> WITNESS: I think I need this. Thank you. Definitions, yes Your Honor?
>
> JUDGE KOUTRAS: Yes, look up a mill.
>
> WITNESS: Includes any ore mill . . .
>
> JUDGE KOUTRAS: Yes, let me highlight this for you, "Mill includes any crushing, grinding or screening plant used in connection with excavation." Let's skip all the other words. "Mill includes any crushing, grinding or screening plant used in connection with an excavation."
>
> WITNESS: OK, Your Honor.
>
> JUDGE KOUTRAS: Is that . . ., does that fit anything that you're doing?
>
> WITNESS: That would fit anybody subject to this Act, yes, Your Honor.
>
> JUDGE KOUTRAS: Would it fit what you're doing at the . . ., leave the question of being subject. You have a screening plant, don't you?
>
> WITNESS: Yes, Your Honor.
>
> JUDGE KOUTRAS: You have a crushing plant, don't you?
>
> WITNESS: Yes, Your Honor.

JUDGE KOUTRAS: And you . . ., you have an excavation going on, don't you?

WITNESS: Yes, Your Honor.

JUDGE KOUTRAS: Does that fit the definition of mill?

WITNESS: As I'm reading . . . .

JUDGE KOUTRAS: In and of itself?

WITNESS: As I'm reading it from here, yes Your Honor. But this is not a complete definition, no. For miller.

JUDGE KOUTRAS: But it's a definition, it's in 56.2?

WITNESS: It is a definition, that's contained in 56.2, yes Your Honor.

JUDGE KOUTRAS: OK.

WITNESS: I don't believe it's applicable.

JUDGE KOUTRAS: OK.

WITNESS: But we do . . ., we do have the same characteristic similarities which we don't deny.

Mr. Fulghum took the position that the respondent does not extract minerals, but is simply excavating rock (Tr. 267). In his opinion, the respondent's dam construction site is not a mine, and the respondent has never developed a mine and has no intentions of doing so (Tr. 268).

Mr. Fulghum characterized the respondent as a "worldwide recognized constructor of dams," and he alluded to an analogous dam construction project at the respondent's Warm Springs Dam project which is located within the enforcement jurisdiction of MSHA's Alameda, California Field Office. He also alluded to several other dam projects where the respondent excavated similar materials used in dam construction, and stated that when inquiries were made of MSHA with respect to its jurisdiction over these activities, no responses were forthcoming (Tr. 269).

Mr. Fulghum stated that the CAL-OSHA Office has issued citations at the aforementioned dam projects, but that MSHA has never inspected those sites or recognized those operations as mines or milling operations (Tr. 270). Mr. Fulghum was of the opinion that the language contained in the April 17, 1989, MSHA-OSHA Agreement excludes the respondent's Cerrillos Dam Construction activities from coverage under the Mine Act (Tr. 271). He believes that the definition of milling, and MSHA's

authority with respect to milling operations, as discussed in the memorandum, are general definitions, but conceded that "sizing and crushing" does define a milling process which is subject to MSHA's jurisdiction (Tr. 275).

Mr. Fulghum confirmed that the dam spillway is part of the dam, and that a "spillway" is a "water diversion" within the meaning of the October 23, 1986, MSHA Memorandum clarifying "key cuts and dam construction" (Tr. 276). He stated that a "key cut" of a dam is an excavation that's necessarily a component of the dam (Tr. 276).

Mr. Fulghum confirmed that the respondent's dam construction operations have been inspected by the local Puerto Rico OSHA Office, which has issued citations. Copies of some of these citations were received for the record, and Mr. Fulghum reviewed and explained them (Tr. 283-289; exhibits R-2 and R-3).

Mr. Fulghum testified with respect to the guarding citations issued pursuant to mandatory standard section 56.14001, Citation Nos. 2558999 through 2559007, September 1, 1987, and he confirmed that they were discussed with Inspector Torres during his inspection closing conference. Mr. Fulghum took the position that it was necessary to remove the equipment guards in order to do maintenance work on the equipment. He explained that the respondent's operation at the dam project was a 7-day a week, 24-hour a day operation, and that production ceases at given times in order to perform maintenance. He took the position that the cited standard only applies when there are moving machine parts which may be contacted and subsequently lead to an injury (Tr. 292-293).

Mr. Fulghum stated that the equipment guards require fabrication and repairs at the shop facility, and once the plant was locked out and shutdown for regular scheduled maintenance, the guards were "removed and improved upon." He stated that he explained this to Inspector Torres and that he responded "if it's not there, regardless, it's a citation" (Tr. 294).

Mr. Fulghum was of the opinion that the cited guards could be removed, and that pursuant to section 56.14006, guards are required to be in place while the equipment is running, unless they are removed to test the equipment. He also pointed out that in order to stay in compliance with section 56.14007, which requires that guards be substantially constructed and maintained, the most common and expeditious manner of doing this is to remove them during the shutdown procedure (Tr. 294-295). Mr. Fulghum further pointed out that the respondent complied with section 56.14029, and that at the time Mr. Torres observed that the guards were missing from the equipment, the power was off and no moving machine parts existed since the equipment was not in fact moving (Tr. 296).

Mr. Fulghum confirmed that the respondent had an established equipment lock-out and tag-out procedure in effect at the time the citations were issued, and that pursuant to the contractual stipulations with the Corps of Engineers, it has submitted Job Hazard Analysis reports for the rock, terciary, and test plants (Tr. 296-298).

Mr. Fulghum confirmed that there is a scheduled time period for equipment maintenance, and that at the time of the inspection by Mr. Torres, the plant was not in operation and was down for maintenance. He confirmed that the production shift began at 11:30 a.m., and that when Mr. Torres was there at 8:00 to 8:30 a.m., everything was shutdown, and it had been shutdown since 4:00 a.m. (Tr. 299-300).

Mr. Fulghum stated that the missing guards were in the shop for repairs at the time Mr. Torres inspected the plant, and that the shift superintendent informed him that they were replaced at 11:30 a.m. He was also informed that they were removed that same morning and reinstalled, and that Mr. Tabor explained this to Inspector Torres during the closing conference (Tr. 300-302). Mr. Fulghum stated that if Mr. Torres had returned at 11:00 a.m., when the plant was in production, he would have seen that the guards were replaced (Tr. 305).

With regard to the walkway Citation No. 2859000, Mr. Fulghum stated that Mr. Tabor informed him during the closing conference that the three individuals exposed to the hazard were employees of MES Services, and not rock plant or terciary plant employees. Mr. Fulghum confirmed that he was not present when the citation was issued and that the cited walkway or platform was part of the Number 3 feeder which is part of the respondent's plant (Tr. 306). Mr. Fulghum did not deny that persons were on the walkway or platform, nor did he deny that it was unguarded (Tr. 308).

With regard to Citation No. 2859002, concerning the lack of handrail's on the No. 6 feeder platform, Mr. Fulghum did not deny that it lacked handrails, and he pointed out that the area was not used on a regular basis. He also pointed out that a gate which had been provided at the cited location was removed because the material would not pass through the plant as quickly as required and that he removed the gate and separated it, and could not find it (Tr. 311).

With regard to the broken conveyor emergency stop cord Citation No. 2859004, Mr. Fulghum conceded that the cord was broken, but he pointed out that the plant was locked down and that in the course of routine maintenance someone would have found the condition and repaired the cord before production was started. Mr. Fulghum stated that Mr. Tabor informed him that he

knew about the broken cord and that it was repaired before production began (Tr. 312).

With regard to the safety shoes Citation No. 2859007, Mr. Fulghum stated that the respondent provides steel protective footwear to its employees at no cost, and that adequate supplies of "dock stoppers" which slip over the feet to protect them in the toe and metatarsal areas are also available for the employees. Mr. Fulghum believed that the cited standard does not require steel toe caps, and that leather boots are "suitable footwear" within the meaning of the standard (Tr. 318).

Mr. Fulghum conceded that some employees do not always wear steel toed boots because they work in the field and are not always assigned to the plant, but he reiterated that employees are supplied with "dock stoppers" and that the respondent subsidizes the purchase of steel toed shoes for its employees (Tr. 319).

Mr. Fulghum stated that the respondent has a strict and aggressive safety and loss control program, and that it complies with all MSHA, OSHA, MSCE, NFPA, and Corp of Engineers Safety requirements (Tr. 324-325). He also confirmed that the respondent complies with the annual training and retraining requirements of the law (Tr. 327).

On cross-examination, Mr. Fulghum stated that one of the criteria used for the selection of the location of the dam in question was the availability of the limestone materials that were present in that location (Tr. 331, 335). He confirmed that there are several excavation areas at the dam site, and that all of the excavated materials that are suitable and meet the dam construction criteria are used in the construction of the dam (Tr. 340). Some of the excavated materials which may not be suitable for the construction of the dam are used in other areas, such as access roads, and large boulders and oversized materials are stockpiled as riprap (Tr. 343).

Mr. Fulghum described the materials used for the construction of the dam as "highly altered fibroplastic metal, semi-metal, marine metisetal," commonly referred to as limestone, siltstone, fractured limestone, and hard and soft dirt and rock. He confirmed that all of these materials, with the exception of clay core and riprap, is processed in either the primary or secondary rock plant. As a general rule, all of the material is processed through the primary plant, and he described the nature of the process as follows (Tr. 348-350):

> Q. What determines whether something is sent to the primary plant as opposed to the secondary plant?

A. Everything goes through the primary plant, with the exception of the material I've mentioned earlier, that we brought in from outside. Everything has to go through the rock plant.

Q. OK. And does it all start at the primary plant or is some of it only processed at the secondary plant?

A. I believe they all go through the primary plant. There may be exceptions, but as a general rule they all go through the primary plant.

Q. And in the primary plant, what is the nature of the process?

A. The material is . . ., is taken from the designated spillway excavation, it's brought down in triple seven, hauled in trucks, down hydraulic drove, they reverse into a dump station which contains a radio gate and grizzler. There is a feed apron, with grizzlies and oversized material that's too large to handle is crushed at the general crusher. This material then goes to a screening court where it's segregated according to size, in different sizes.

The product of the screening decks are basically drove through and some oversized returns to a cone crusher, back up to the screening deck to get the right proportion of the sizes together to make a dam. It then leaves that area and it goes along the product belts. Two of the products really have nothing done, the rock product, the 20-inch product, it comes . . ., as soon as it comes off the grizzly and goes through the first selection, it's sent out into a dump pile as a rock zone. The second is a product called transition and that's just everything else in between. But it is screened and it is crushed. But not to the specifications of a normal aggregate.

Q. Not to what?

A. The specifications of a normal aggregate.

Q. OK.

A. In fact, you couldn't sell this aggregate to anybody as an aggregate or in its current form.

Q. And after these materials come out of the primary plant, is there any further processing or are they eventually used . . . .

A. No, sir, those are in place materials.

Q. So they . . ., they come out . . . .

A. Well, they do have another process which affects the size, it's anticipatory in the design engineer's mind that one of the criteria is not only the particular size, but they have to have a pack, in other words, we take big rollers to make sure that they meet maximum density and there is an anticipated further crushing action by these large rollers that roll back that is also taken in the design criteria. So that would be the last of the process, it's when it's rolled in place on the embankment. But other than that, as far as going through the plant, those two products, transition and rock, come right off the plant. And the stockpiles, these stockpiles you see around the photographs are that rock.

Q. OK and what is the end product used for?

A. The end product is used for embankment material on the dam.

Mr. Fulghum described the process which takes place at the secondary crusher or rock plant as follows (Tr. 350-352):

Q. In terms of the secondary crusher or rock plant, what process is performed there?

A. That takes material either out of the transition stockpile and as I said in the past, well, it would be the same process. We had to reset our entire plant. Well, let's . . ., let me take it one step at a time. Let us assume that it comes from the excavations that are required on the project, that material will be taken out of the transition stockpile. It would go into a feed hopper with the primary feed. Then it goes through a screen deck, a wet screen deck. And this is filtered, it has to be free of all dirt.

It goes through the screen deck and the product comes out and it goes through I believe two giratory crushers there. We also have a large hydrocone there. These break it down into particle sizes and the proportions of the particles we need to make in the filter blanket. They then go up into a replane, to a second screen deck which, most of this . . ., this is not the original plant, but as the plant is being modified in its current state, to match the material, we now have the screen deck with the second screen plane that goes out.

Currently and I doubt if it's completed today, we also have the third process in which to break it down into size and where we're going to use a hammerlock, an impact, an impact crusher is what you call it. That product is either refined or coarse. The coarse goes to the coarse filter, the fine goes to the fine filter.

Q. And in terms of the product that is processed in the secondary plant, what is that used for?

A. That is the product, sir, that is the filter.

Q. For the filter?

A. Yes, sir.

Q. What is a filter?

A. In order for a dam to maintain a stability, it has to have someway for the water to relieve itself without becoming a massive herd as I mentioned earlier in the morning. * * * We put the clay down and the filter lays against the clay in order that we don't get a massive saturation in which the rock fill dam cannot drain as quick as the water level comes down and that's the function of the filer, sir.

Mr. Fulghum confirmed that the respondent purchased limestone aggregate from outside sources, and that it was processed through the filer plant. He also confirmed that aggregate, sand, and cement was purchased and used to batch or make concrete in the batch plant (Tr. 353-355). The only outside purchased material processed in the primary or secondary plant was the 3-inch minus product used in a pilot test program processed for the Corps of Engineers (Tr. 356).

Mr. Fulghum confirmed that the prior OSHA inspection's resulted from employee complaints and two fatalities which occurred at the dam embankment, and he had no knowledge as to whether or not OSHA inspected the project as part of any general inspection (Tr. 358-360).

Mr. Fulghum confirmed that all of the equipment used in the rock plant facilities originated from sources outside of Puerto Rico, and that it was brought in from the Warm Springs Dam located near San Luis, California (Tr. 361).

Mr. Fulghum stated that he was not present at the project on August 31, 1987, during the first inspection conducted by Mr. Torres (Tr. 362). He was present late in the evening of September 1, 1987, but had no direct knowledge of any statements

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 13 1989

BIG HORN CALCIUM COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 88-67-RM
v.	:	Citation No. 3065941; 12/5/87
	:	
	:	Docket No. WEST 88-68-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 3065942; 12/5/87
	:	
	:	Docket No. WEST 88-69-RM
	:	Citation No. 2648962; 12/9/87
	:	
	:	Docket No. WEST 88-70-RM
	:	Citation No. 2648963; 12/9/87
	:	
	:	Docket No. WEST 88-71-RM
	:	Citation No. 2648964; 12/10/87
	:	
	:	Docket No. WEST 88-72-RM
	:	Citation No. 2648965; 12/10/87
	:	
	:	Docket No. WEST 88-73-RM
	:	Citation No. 2648966; 12/10/87
	:	
	:	Docket No. WEST 88-74-RM
	:	Citation No. 2648967; 12/10/87
	:	
	:	Docket No. WEST 88-75-RM
	:	Citation No. 2648968; 12/10/87
	:	
	:	Docket No. WEST 88-76-RM
	:	Citation No. 2648970; 12/10/87
	:	
	:	Docket No. WEST 88-78-RM
	:	Citation No. 2648971; 12/10/87
	:	
	:	Warren Quarry & Mill
	:	Mine ID No. 24-00006
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 88-203-M
	:	A.C. No. 24-00006-05513
	:	
v.	:	Docket No. WEST 88-204-M
	:	A.C. No. 24-00006-05514
BIG HORN CALCIUM COMPANY, Respondent	:	
	:	Docket No. WEST 88-205-M
	:	A.C. No. 24-00006-05515
	:	(And Related Contest Dockets)
	:	
	:	Warren Quarry & Mill

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon motion for approval of a proposed settlement of the 22 alleged violations in these 3 dockets and the same appearing proper and in the full amount of the initial assessments for 21 of the 22 alleged violations, the settlement is approved.

As reflected in the caption, this matter resolves a total of 11 contest dockets and 3 related penalty dockets. The three related penalty dockets involve a total of 22 enforcement documents (Citations and Orders). The settlement disposes completely of these 22 proposed penalty assessment as well as an additional Citation which is the subject of Contest Docket No. WEST 88-75-RM but which was not, apparently due to administrative oversight, made the subject of a proposal for penalty, all of which is reflected below. Big Horn Calcium Company, upon approval of this settlement, agrees to withdraw its contest proceedings herein.

1. Docket No. WEST 88-203-M

Citation No.	Proposed Penalty	Related Contest Proceeding
2645747	$ 20.00	
2645748	20.00	
2645749	20.00	
2645750	68.00	
2645753	68.00	
2645754	20.00	
2645755	20.00	
2645756	20.00	
2645757	20.00	
2645763	20.00	(88-70-RM)
2645764	20.00	(88-71-RM)
2645765	20.00	(88-72-RM)
2645766	20.00	(88-73-RM)
2645767	20.00	(88-74-RM)

Big Horn Calcium Company agrees to pay the above penalties and such are here assessed.

2. Docket No. WEST 88-204-M

Citation No.	Proposed Penalty	Related Contest Proceeding
3065941	$1,000.00	(88-67-RM)
Order No. 3065942	$1,000.00	(88-68-RM)
Citation No. 2648962	300.00	(88-69-RM)

(a) Pursuant to the agreement reached, Citation No. 3065941 is modified from Section 104(d)(1) to Section 104(a) since pretrial preparation disclosed that the violation was not the result of an unwarrantable failure on the part of the mine operator. Likewise, the negligence showing on the Citation is reduced from "reckless disregard" to "high". The proposed penalty of $1,000.00 and the designation of the violation as significant and substantial shall remain unchanged.

(b) Order No. 3065942 is also modified from Section 104(d)(1) to Section 104(a). Again, pretrial preparation disclosed that the violation was not the result of an unwarrantable failure on the part of the operator and, accordingly, the negligence shall also, as agreed, be reduced from "reckless disregard" to "high". The proposed penalty of $1,000.00 and the designation of the violation as significant and substantial shall remain unchanged.

(c) Citation No. 2648962 and its $300 proposed penalty shall remain unchanged.

(d) Big Horn Calcium Company agrees to withdraw its contest to the citations and order as amended herein and to pay the penalties above reflected. Such are here assessed.

3. Docket No. WEST 88-205-M

Citation No.	Proposed Penalty	Related Contest Proceeding
2645752	$20.00	
2645758	20.00	
2645759	20.00	
2648970 (Vacated)	(20.00)	(Withdrawn) (88-76-RM)
2648971	20.00	(88-78-RM)

(a) The Secretary having moved to vacate Citation No. 2648970 and to withdraw her proposed penalty therefor on the basis of insufficient evidence, such motion is approved and Citation No. 2648970 is VACATED.

(b) Big Horn Calcium Company agrees to withdraw its contest to the other four (4) citations in Docket No. WEST 88-205-M and to pay the above penalties which are here assessed.

4. Docket No. WEST 88-75-RM

A civil penalty proceeding was never filed by MSHA with respect to this Citation (No. 2648968). While a civil penalty has not been proposed, the parties agree that a $20.00 penalty is

appropriate. This agreement is approved as part of this overall settlement. Big Horn Calcium Company agrees to withdraw its contest to Citation No. 2648968 and to pay the agreed penalty which is here assessed.

In consenting to this settlement agreement, the parties have agreed (1) that nothing therein shall be deemed an admission by Big Horn Calcium Company of a violation of the Federal Mine Safety and Health Act, or regulation or standard thereof, in any judicial or administration forum other than an action brought by the United States Government under the Federal Mine Safety and Health Act, and (2) that by entering this settlement agreement, Big Horn Calcium Company does not admit to a violation of the Federal Mine Safety and Health Act, or regulation or standard thereof, for the purpose of any judicial or administrative proceeding which directly or indirectly concerns the civil or criminal liability of any or all directors, officers and agents of Big Horn Calcium Company regarding the subject matter, allegations and issues related to Citation No. 3065941 and Order No. 3069542 [Docket No. WEST 88-204-M].

In the premises, the amicable resolution reached by the parties appears appropriate and is approved with the parties to bear their own fees and expenses.

ORDER

1. Citation No. 2648970 is VACATED.

2. Citation No. 3065941 and Order No. 3065942 are MODIFIED as specified hereinabove.

3. The 11 Contest proceedings listed in the Caption are, based on this approval of settlement, DISMISSED.

4. Big Horn Calcium Company, if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the sum of $2,776.00 as and for the civil penalties hereinabove assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 13 1989

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-311 A.C. No. 46-06898-03538
v.	:	
	:	No. 1 Mine
DAVIDSON MINING, INC., Respondent	:	

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
William D. Stover, Esq., M.A.E. Services, Inc., Beckley, West Virginia, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", for alleged violations of regulatory standards. The general issues before me are whether Davidson Mining, Inc. has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Prior to the commencement of testimony at the hearing, the parties advised me that they had a proposed settlement of three of the four citations at issue. Citation Nos. 9959649, 9959659 and 9959660 were each assessed at $227 for violations of 30 C.F.R. § 70.101 and Davidson has agreed to pay the full assessed amount of $227 each in settlement of that portion of this case. I approved that settlement from the bench, and confirm it herein.

The remaining section 104(a) citation; Citation No. 2904279 alleges a violation of 30 C.F.R. § 75.200, and proposes to assess a civil penalty of $168.

The respondent's portion of the case was heard in Huntington, West Virginia, on February 7, 1989. The Secretary's case was submitted by documentary evidence and the affidavit of Inspector James E. Davis, which was filed on April 3, 1989.

Citation No. 2904279 alleges a "significant and substantial" violation of the roof control standard and alleges in particular as follows:

> The investigation of a non-fatal fall of roof material accident that occurred on 3/3/88, at approximately 1:30 p.m., in the last open crosscut of the No. 5 entry intersection, on the No. 008-0 unit, revealed that the roof was inadequately supported, in that a piece of roof measuring approximately 90 inches in width, 87 inches in length and 0 to 3 inches in thickness fell around and between three roof bolts, struck a miner, resulting in serious injuries, the injured miner becoming hospitalized and disabled for an extended period of time.

On March 3, 1988, a serious, non-fatal roof fall accident occurred in the intersection of the last open crosscut in the No. 5 entry on the Jim Hazel Mains supersection (008-0) of the No. 1 Mine. David McKinney, a roof bolter, was seriously injured when he was struck by a large rock which fell around and between three roof bolts. The rock measured approximately 90 inches in width, 87 inches in length and up to 3 inches in thickness.

MSHA Inspectors Dooley and Davis investigated this accident and Davis authored the Report of Investigation which was received into evidence as Government Exhibit No. 2. During his investigation, Inspector Davis encountered drummy roof conditions indicative of a separation in the overlying strata of the roof in several areas outby the accident scene. These conditions were detected in areas where the continuous miner had left draw rock on the roof as the coal was mined. At the accident scene, Davis found additional areas of drummy roof in the vicinity of the prior roof fall, but in his opinion, these areas all seemed to be adequately supported. He also took a look at the three roof bolts that had been present when the roof fell between and around them and was satisfied that there was no evidence that these roof bolts had been damaged or improperly installed.

While standing in the area where the roof fall had occurred, he heard a noise from an outby area which sounded like rock falling. He asked what that noise was and someone responded that that noise was the roof falling around and between roof supports and that such falls were not unusual on the section. He does not know the identity of the person who made the statement, but everyone in the group present heard it and no one, including management personnel present disagreed with it.

Inspector Davis stated that the section was being developed in accordance with the approved roof control plan then in effect. The company was using 4 foot fully grouted resin bolts and 6 by 16 inch bearing plates. These measures exceeded the minimum requirements of the roof control plan. The roof supports were being installed on spacings of 4 to 5 feet along the length of the entries and 4 foot spacings across the width of the entries. In the immediate area of the roof fall, the bolts were installed on spacings that varied from 3 feet 1 inch to 4 feet 11 inches. The investigation, in Inspector Davis' opinion, did not disclose any violations of the roof control plan, nor is the operator being charged with any violation of the roof control plan.

Several witnesses were interviewed by the two inspectors and they stated that in this mine it was not uncommon to have the roof fall between and around the roof bolts as it did in this case.

Inspector Davis, while acknowledging that the operator has made some efforts above and beyond the requirements of the roof control plan, still felt that management was aware of the hazard created by leaving areas of uneven draw rock in the roof that can and do separate from the main roof and which often ultimately results in draw rock falling out between the bolt patterns, as it did in the instant case. The inspector further opined that since management was aware of this fact, it was incumbent on them to take additional measures necessary to adequately support the roof. He suggested straps be installed to adequately support the areas between the roof supports which are not directly supported by the bearing plates. In a nutshell, he wrote the citation at bar because he believed the roof was inadequately supported and commonly fell out between the roof supports installed by the operator.

At the hearing, witnesses called by Davidson confirmed that draw rock commonly fell between and around the roof bolts. Mr. Vance testified that draw rock as large as the rock in the instant case had been known to fall out prior to the accident. David McKinney, the injured miner, stated that he had observed draw rock fall out between and around the roof bolts as well. In response to a question as to whether or not it was an unusual occurrence, McKinney responded "[n]o, sir. It happens. Not often, but it has happened".

The fact that Davidson did not violate its roof control plan is not controlling for purposes of determining the existence of the violation at issue. Section 75.200 requires both compliance with a roof control plan approved by the Secretary and that the roof be supported or otherwise controlled adequately. An

operator's failure to comply with either requirement violates the standard.

Here, the violation of section 75.200 is predicated upon the standard's requirement that the roof and ribs be supported or otherwise controlled adequately. Liability under this part of the standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987).

The respondent urges that the roof in the immediate accident area gave no warning nor had any physical appearance of being unstable prior to the accident. The section foreman had made a visual inspection of the section before starting work at the beginning of the shift and had made periodic examinations of the mine roof during the shift, including using the sound and vibration method to check for drummy roof. Despite these efforts, the unstable roof in the immediate area of the roof fall was unfortunately not detected.

I agree with respondent that there has been no showing that there were any objective signs that this particular piece of rock was going to fall out of the roof when it did. However, the evidence of record clearly demonstrates that draw rock commonly fell between and around the roof support being routinely used by Davidson in this mine and on this section, and that is sufficient in my opinion to prove up the violation.

Inspector Davis has been an MSHA Coal Mine Inspector since May of 1971 and prior to that had an additional 18 years of coal mining experience. Therefore, I credit his knowledge of standard mining practice a great deal. He based his decision to cite the respondent on what he personally observed in the mine during the accident investigation process and the statements of the miner witnesses who related the relevant history of what had been going on with the mine roof.

Accordingly, I conclude that the roof support in the area cited was inadequate to prevent draw rock, of sufficient size to injure a miner, from falling out of the roof. Additionally, I find that the Commission's "reasonably prudent person" would have, by the time of the accident involving Mr. McKinney, recognized that something more in the way of roof support was

needed to prevent the continuing falls of draw rock between and around the existing roof support, and provided it. Citation No. 2904279 is therefore affirmed.

Finally, it is undisputed that the injuries that Mr. McKinney sustained in the roof fall in March of 1988 have continued to prevent his returning to work at least through the date of the hearing. Therefore, I believe it can be inferred from the circumstances that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $168, as proposed, is reasonable for the violation which has been found herein.

ORDER

Davidson Mining, Incorporated is directed to pay civil penalties of $849 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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JUL 14 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-26-M
	:	A. C. No. 15-15676-05510
v.	:	
	:	Docket No. KENT 89-27-M
MOUNTAIN PARKWAY STONE, INCORPORATED	:	A. C. No. 15-15676-05511
Respondent	:	Staton Mine

DECISION

Appearances: Michael L. Roden, Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Jeffrey T. Staton, Vice President, Mountain Parkway Stone, Incorporated, Stanton, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

In the above captioned cases, the Secretary (Petitioner) seeks Civil Penalties for alleged violations by the Operator (Respondent) of various safety standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard in Lexington, Kentucky, on May 16 - 17, 1989. Eric Shanholtz and Vernon Denton testified for Petitioner, and Charles Williams, Teddy Combs, Vernon Denton, and Jeffrey T. Staton testified for Respondent. Both Parties waved their right to present closing oral arguments or to submit Post-hearing Briefs and Proposed Findings of Fact.

Stipulations

The following stipulations were agreed to by both Parties:

1. Mountain Parkway Stone, Incorporated, is a Kentucky corporation which produces limestone for resale in interstate commerce and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges.

2. As of June 1988, Mountain Parkway Stone, Incorporated produced approximately 172 tons of limestone per day (45,000 annually) at its sole underground mine site, the Staton Mine in Powell County, Kentucky, and employed six full time employees in June 1988. At the date of the Hearing Respondent had five employees.

3. J. T. Staton is, and was in June through August 1988, the President of Mountain Parkway Stone, Incorporated, and the supervisor of the Staton Mine.

Findings of Fact and Discussion

Docket No. KENT 89-26-M.

Citation No. 3253127.

Eric Shanholtz, an MSHA Inspector, essentially testified that on June 16, 1988, when he inspected Respondent's mine, he measured the level of noise while standing below the level of the bin and to the front of Respondent's primary crusher. He said that he measured the noise for 2 and 1/2 hours until the crusher broke down. He indicated that there was an over exposure of 135 percent to the employee in the control booth. He issued a section 104(a) Citation asserting a violation of 30 C.F.R. § 57.5050(b).

30 C.F.R. § 57.5050(a) as pertinent, provides that noise level measurements "shall" be made using a meter ". . . meeting specifications for Type 2 Meters contained in American National Standards Institute (ANSI) Standard S1.4-1971 general purpose sound level meters." The record does not contain any evidence as to the type of meter, if any, used by Shanholtz. Further, section 57.5050, supra, sets forth various permissible dBA levels relating to duration per day of hours of exposure. Aside from the conclusional statement of Shanholtz that the levels resulted in an over exposure of 135 percent, the record does not contain any evidence of any dBA level.

Also, section 57.5050(b), supra, provides, in essence, that if there is a noise level exposure which has not been reduced by administrative or engineering controls, ". . . personal protection equipment shall be provided and used to reduce sound level to within the levels of this table. According to Shanholtz, the primary crusher operator was wearing ear plugs, but would still be subject to a permanent disability. There is no evidence that the ear plugs did not reduce the sound levels for the wearer, within the levels set forth in subsection a, supra.

Accordingly, it is concluded that the evidence fails to establish that the Respondent herein violated section 57.5050, supra. Accordingly, Citation 3253127 shall be dismissed. In light of this Decision, it is further concluded that the subsequently issued Citation No. 2861249, alleging a violation of section 104(b) of the Act, was improperly issued and shall be dismissed.

Citation 3253323.

Shanholtz testified that on July 20, 1988, he was told by some of Respondent's employees that an employee had been off from work with a pulled muscle in his back, which had been sustained on the mine property on June 27. Shanholtz indicated that Staton told him that Respondent did not have any MSHA Accident Report Forms, and these were subsequently provided to him by Shanholtz. Shanholtz further indicated that the accident was not reported to MSHA on its forms although the accident was reported in Respondent's records. A Citation was issued alleging a violation of 30 C.F.R. § 50.20.

Section 50.20, supra, provides, in essence, that an operator shall maintain a supply of MSHA Mine Accident Report Forms, and shall report accidents on such forms to be submitted to MSHA. Inasmuch as the uncontroverted evidence indicates that at the time of the accident in question, Respondent did not have any of the proper MSHA Forms, and did not report this accident to MSHA on its forms, a violation of section 50.20 has occurred as alleged. Taking into account the fact that this accident was recorded by Respondent in its records, and there was no evidence that this accident was caused by Respondent's negligence or caused by any instrument, property or condition under its control, it is concluded that a penalty herein of $20 is appropriate.

Citation 3253324.

Shanholtz testified that on July 21, 1988, he observed one of Respondent's employees lying under an axle of a dump truck with his shoulder on the ground, using a sledge hammer to knock tires off the vehicle. He indicated that the axle and the truck were above the employee and that the truck was "suspended" by a front-end loader bucket (Tr. 160). He said that the supporting unit was being used beyond its capacity, as its hydraulic system was less than adequate for what it was being used. Accordingly, Shanholtz issued a citation under sections 107(a) and 104(a) of the Act alleging a violation of 40 C.F.R. § 57.16009.

Section 57.16009, supra, provides that "Persons shall stay clear of suspended loads." (Emphasis added.) Webster's New Collegiate Dictionary (1979 edition) defines suspend, as pertinent, as ". . . a: HANG; esp: to hang so as to be free on all sides except at the point of support . . . b: to keep from falling or sinking by some invisible support . . . ." Although Shanholtz

testified that the truck, under which the employee was observed working, was "suspended" by a front-end loader bucket, (Tr. 160), there is no evidence that the truck, under which the employee was working, was in any way hanging from or free on all sides except for a point of support. It appears from Shanholtz' testimony that the truck was raised off the ground by the front-end loader bucket, but there was not any evidence that it was hanging free from the bucket except for the point of support. Accordingly, it is concluded that there was no violation herein of section 57.16009, supra, and the Citation must be dismissed.

Citation No. 2861250.

In essence, Shanholtz testified that on August 17, 1988, he observed Respondent's haulage road which he indicated as being approximately half a mile long, and at a 12 degree slope. He indicated that the outer edge of the roadway was exposed. He said that some of the berm had deteriorated "over a period of time" and that "the berms in this area probably washed away and weathered" (Tr. 481). (sic.) He issued a section 104(a) Citation alleging a violation of 30 C.F.R § 57.9022.

Section 57.9022 provides that "Berms or guards shall be provided on the outer bank of elevated roadways." On cross-examination Shanholtz revealed that he had not measured the berm, and that only some areas did not have a berm. According to 30 C.F.R. § 57.2 a berm is defined as ". . . a pile or mound of material capable of restraining a vehicle." The record does not contain any evidence of the type of berm in question, or its detailed description. Nor is there in the record any measurement of the areas of the roadway that allegedly did not have a berm. Thus, it is concluded that it has not been established by the weight of the evidence that the roadway did not have a berm capable of restraining a vehicle. Accordingly, it is concluded that it has not been established that Respondent herein violated section 57.9022, and accordingly, Citation 2861250 must be dismissed.

Docket No. KENT 89-27-M.

Citation No. 3253179.

Shanholtz testified, in essence, that on June 16, 1988, he observed smoke and exhaust fumes coming out of the portal of Respondent's mine. He said that he went approximately 600 to 700 feet underground using a drager pump and a sorbet tube. He said that the testing device has a scale which can be read, and the results indicated "extreme high" levels of nitric oxide and nitrogen dioxide, and "high" levels of carbon monoxide (Tr 33). He said that the nitrogen dioxide was an extremely dangerous contaminant, and blackened the tubes so that it could not be measured. He indicated that nitrogen oxide has a threshold level of 25 parts per million, and carbon monoxide has a threshold level of 50 parts per million. He indicated that nitrogen dioxide has a

ceiling level of 5 parts per million. Shanholtz issued a section 107(a) Withdrawal Order and a 104(a) Citation alleging a violation of 30 C.F.R. § 57.5001(a).

Section 57.5001, supra, in essence, provides that exposure to airborne contaminants shall not exceed ". . . on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists and contained in the 1973 edition of its publication entitled 'TLV'S Threshold Limit Values for Chemical Substances in Workroom Air Adopted by AGGIH for 1973,' . . . ." Shanholtz indicated that the "contaminants" blackened the tube and could not be measured (Tr. 35). However, he offered no explanation as to the manner in which the testing device operated. Thus, I do not have any evidentiary basis to evaluate the observation that the tube was blackened. Similarly, Shanholtz' comments that the contaminants could not be measured in the tube was not explained, and hence I can not evaluate its significance. Further, the best evidence, of threshold limit values for various substances, as required by section 75.5001, supra, is the publication of the American Conference of Governmental Industrial Hygienists, referred to above. Neither that publication, nor any part thereof, was offered in evidence. Nor did Shanholtz make reference to that publication as the basis for his testimony as to various threshold values. Further, there is no evidence in the record that any contaminants in question exceed any threshold values ". . . on the basis of a time weighted average." (Section 57.5001, supra.) Indeed, no evidence was presented as to any time weighted average. Thus, I conclude that the Petitioner has not adduced sufficient evidence to establish that the Respondent herein violated section 57.5001, supra. Accordingly, Citation No. 3253179 is dismissed.

Citation No. 3253131.

Shanholtz indicated that on June 17, 1988, he observed sparks, which he described as hot carbon sparks, coming out of the exhaust of a diesel engine which was located on the rear of a boom truck. He indicated that the sparks were hitting the rear of the boom truck or the hydraulic reservoir. He further indicated that the situation was dangerous, as there was leakage and spillage from the hydraulic reservoir, and also the "presence" of ammonia nitrate, which he described as a blasting agent, and explosives being loaded (Tr. 113). He issued a section 107(a) Withdrawal Order and a section 104(a) Citation citing a violation of 30 C.F.R. § 57.6250.

Section 57.6250 indicates, as pertinent, that "Smoking and open flames, . . . shall not be permitted within 50 feet as measured by the line of sight of explosives, blasting agents, ..." The sparks coming out of the diesel engine exhaust, on a "continuous" basis as described by Shanholtz (Tr. 126), would not appear to be within the purview of section 57.6250, which prohibits smoking and open flames. The record does not contain any evidence of the distance between the sparks and the ammonia

nitrate, referred to as the blasting agent, or between the sparks and explosives. Also, there is no evidence of the distance between the sparks and the hydraulic leakage or spillage observed by Shanholtz. It is clear that there has not been a violation of section 57.6250, which prohibits flames "within 50 feet" of explosives and blasting agents. Further, aside from the opinion of Shanholtz that the hydraulic fluid was combustible, there is no evidence that such was either an explosive or a blasting agent. For these reasons, I find that Petitioner has failed to establish that the conditions observed constitute a violation of section 57.6250. Therefore, Citation 3253131 is dismissed.

Citation No. 3253336.

Shanholtz indicated that on August 17, 1988, he pumped the brake pedal of an idle boom truck "several times" (Tr. 200) without starting the engine. He said that the brake pedal went to the floor. Also, he indicated that the hydraulic reserves were empty and dry, and that there was evidence of leakage at the wheels. He also indicated that two of Respondent's employees told him that the truck did not have brakes, and that Gary Parks told him that he stopped the truck by running it into a large rock rib or muck pile. Charles Williams, a mechanic working for Respondent, indicated that he had operated the truck in question, stopped it with the brakes, and he had not seen other employees stop it by running it into something. He also indicated that the truck is equipped with vacuum hydraulic brakes, and the engine has to run in order to apply the brakes so that the booster can work.

I do not accord much probative value to the testimony of Williams with regard to his experience operating the truck and being able to stop it, as his testimony did not establish that he actually had driven the truck on the day it was tested by Shanholtz, nor at any time in reasonable proximity to Shanholtz' inspection. Based on Shanholtz' testimony that the brake pedal went all the way to the floor and, importantly, that the hydraulic reserves were empty and dry with evidence of hydraulic leakage at the wheels, I find sufficient evidence to conclude that the vehicle in question did not have "adequate brakes." Accordingly, I conclude that Respondent did violate 30 C.F.R. § 57.9003.

The only evidence with regard to the likelihood of the occurrence of a reasonably serious injury, consists of Shanholtz' testimony that it is "MSHA's experience," (Tr. 188) that operating a vehicle without brakes will result in a fatality. I find this conclusion insufficient to establish a finding that there was any imminent danger involved. Further, considering the unrebutted testimony of Williams that the vehicle had two braking systems, and considering the lack of detailed testimony concerning the terrain in which the vehicle operated, i.e., whether the area

was level, and whether there were drop-offs or obstacles in the vicinity, it must be concluded that it has not been established that there was any reasonable likelihood of an occurrence of a reasonably serious injury. Accordingly, I conclude that it has not been established that the violation herein was significant and substantial (Mathies Coal Co., 6 FMSHRC 1, (January 1984)).

Althougn Williams indicated, in essence, that he did not have any difficulty stopping the vehicle in question, his testimony does not establish when he last was able to drive the truck and stop it. According to Shanholtz, the brake pedal went down to the floor, and it would appear that this condition would be obvious to any one driving the truck. Further, Shanholtz testified that two employees told him that the vehicle did not have brakes and it was stopped by driving into an obstruction. Thus, I find that the negligence of Respondent herein was relatively high. Further, I find that Respondent has not adduced any evidence to establish that its operation would be adversely affected by the imposition by any fine herein. As noted above, I find that the record does not establish a description of the terrain in which the vehicle in question was operated. As such, I conclude that it has not been established that the gravity of the violation herein was of a high degree. I nave taken into account the remainder of the statutory factors of section 110 of the Act, as stipulated to by the Parties, as well as the history of violation as indicated by Exhibit 1. Taking into account all these factors, I conclude that a penalty herein of $200 is appropriate for the violation found herein.

Citation No. 325338.

Shanholtz testified that he observed various safety defects with regard to a boom truck. He indicated that there was no stability jacks to support the truck when the boom was in the air, and therefore there was a possibility of the truck overturning if it was used in the wrong capacity. He said he also observed hydraulic leaks at the cylinder, which created a danger of a fire or a slipping hazard. He also indicated that the doors were missing, there were no lights, and there was a rag in the gas tank which acted as a wick for the gas, causing a danger of ignition. Shanholtz issued a 104(a) Citation alleging a violation of 30 C.F.R. § 57.9002.

Section 57.9002, supra, provides that "Equipment defects affecting safety shall be corrected before the equipment is used." The record does not establish that the truck in question was being used. Inasmuch as section 57.9002, requires safety defects to be corrected as a condition precedent to the use of the equipment, it is clear that there is no violation in the absence of evidence of the equipment being used. Since there is no evidence that the truck in question was being used, the Citation herein is dismissed.

Citation No. 3253340.

Shanholtz indicated that on October 17, 1988, one of Respondent's employees, Raymond Patton, told him that the previous day he had to throw rocks under the wheel of a compressor truck in order to stop it, as the brakes did not hold. He also indicated that another employee had told him that he had trouble with brakes the day before. Shanholtz said that he did not start the truck, but applied the brake with his foot and there was no resistance as the pedal went to the floor. He said he checked for hydraulic fluid, but did not find any.

Teddy Combs testified on behalf of Respondent and indicated that he operated the truck in question and stopped it by applying the brakes.

I do not place much weight on Combs' testimony, as his testimony did not establish that he was able to stop the truck the same date as Shanholtz' inspection, or at some time in close proximity to that day. Based on the testimony of Shanholtz, I conclude that the brakes on the truck in question were not adequate, and as such Respondent violated 30 C.F.R. § 57.9003.

According to Shanholtz, the violation herein was significant and substantial based on the experience of MSHA that operating a vehicle without brakes is highly likely to result in a fatality or serious injury. In the absence of specitic testimony with regard to the specific terrain on which the vehicle in question traveled, and the circumstances under which it was operated, I find the testimony of Shanholtz insufficient to support a conclusion that the violation herein was significant and substantial.

According to the uncontradicted testimony of Shanholtz, he was told by two employees that they had driven the truck in question the previous day and the brakes did not work. Further it is clear that one operating the truck would have noticed that the brake pedal did not have any resistance. Hence I find the Respondent herein acted with a relatively high degree of negligence in not having the brakes repaired. Taking this into account, as well as the remaining statutory factors, I find that a penalty herein of $200 is appropriate for the violation herein.

Citation No. 2861242.

Shanholtz indicated that on August 17, 1988, he inspected an "old" truck which had a mobile drill placed on it (Tr. 277). He said that the foot brake pedal went to the floor, and that although the truck had an air braking system, there still should have been some resistance to the brake pedal. He indicated that he did not start the truck, but the brake lines were "deteriorated," bent and broken, and "nonfunctional" (Tr. 280). He indicated that although there was a parking brake handle which he

applied, he looked and to the best of his knowledge there was no cable . He also indicated that Respondent's employees told him that they had to drive the truck into a stock pile or rib to stop it whenever they used it.

Combs indicated that he had operated the drill prior to August 17, and that the brakes did operate. He said that the engine must operate before the hydraulic system can function. He also said that the parking brake worked. Williams indicated that he used the truck once or twice and the parking brake did work.

I do not place much weight on the testimony of Combs and Williams with regard to the functioning of the brakes on the subject truck, as Williams indicated that he used it only once or twice and did not indicate the time period in which he used it, and how close that period was to the inspection by Shanholtz. Combs indicated that he last ran the truck 3 weeks to a month prior to the inspection. I find this too remote in time to be probative of the condition of the brakes at the date of inspection.

Based on the testimony of Shanholtz, I find that the truck did not have adequate brakes. The truck clearly is a power mobile piece of equipment, in spite of the fact that at the time of the inspection it had flat tires. As such, I find that there has been a violation herein of section 57.9003, supra, as cited by Shanholtz. The testimony of Shanholtz and the balance of the evidence with regard to the issue of significant and substantial, is essentially the same as was presented in Citation No. 3253340. For the reason that I discussed, infra, P. 6, I find that it has not been established that the violation herein was significant and substantial. I find that a penalty herein of $200 is appropriate, based on the same reason set forth in Citation Nos. 3253336 and 3253340, infra, P. 6, 7.

Citation No. 2861244.

Shanholtz, in essence, indicated that on August 17, 1988, he observed a lot of large overhanging trees (Tr. 330) which he described as an extremely dangerous situation. He also said "There was loose ground there. It was obvious, large slabs." (Tr. 331). According to notes he had made on August 17, 1988, he indicated that the material he observed was above and to both sides of the portal. Shanholtz issued a citation alleging violation of 30 C.F.R. § 57.3200, which, as pertinent, provides that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area."

Respondent presented testimony from Denton and Williams. I do not place much weight on their testimony with regard to the conditions in question as neither of them observed the conditions on the date in question, and their testimony was limited to interpreting photographs (Exhibits 26, 28, 29, and 37).

Based on Shanhotz' testimony I find that on the date of the Citation there were certain conditions that created a hazard. However, on the date in question, there is no evidence that there was any work or travel in any area affected by the observed conditions. Denton and Williams preferred their opinions, based solely on their examinations of the photographs, Exhibits 26, 28, 29, and 37, as to the time sequence of various shots. I do not find any of this testimony helpful in resolving the issues herein. I find that Petitioner has failed in its burden in establishing by competent evidence that any work or travel was permitted by Respondent in any area affected by the conditions he observed that he termed to be dangerous. Indeed, there is no evidence whatsoever which delineates the "affected area." (Section 57.3200, supra). Hence I must conclude that it has not been established that there has been any violation of section 57.3200, supra. Accordingly, I find that Citation No. 2861244 shall be dismissed.

Citation No. 20612147.

Shanholtz indicated that on August 17, 1988, he observed a front-end loader operating in "uneven terrain" (Tr. 406). He said that Raymond Parks was operating it and that he (Shanholtz) noticed that Parks was using the reverse gear to stop the loader when it was going forward, and using the forward gear to stop it when it was going backwards. Shanholtz said that he asked Parks to back it up and stop it, and Parks backed the vehicle up at 5 to 10 miles an hour, put the brake on, pumped the brakes three times and it traveled approximately 100 feet before it stopped. He said that the vehicle stopped when Parks dropped the bucket. Shanholtz said that he asked Parks if there were problems with the brakes, and Parks said that he "didn't have any" (Tr. 408). Shanholtz indicated that he did not check the hydraulic system reservoir, and said that the backup system can only be used 4 or 5 times. Shanholtz issued a Citation alleging a violation of 30 C.F.R. § 57.9003.

Williams testified that at approximately 6 a.m. on the day of the inspection, August 17, he loaded the above vehicle and it stopped "real fast" (Tr. 425). He said that after the inspection the booster system was checked with a gauge, and it read 300 pounds which meant it was not depleted. He indicated that to abate the Citation a hydraulic system pump was replaced, but that the old one was "operating good" (Tr. 431). In essence, he indicated that the reason why the pump was replaced was "because he had to try and fix it whatever was wrong with it" (Tr. 428).

Although the brakes may have operated satisfactorily when Williams drove the vehicle in question at 6 a.m., I find nothing in the record to contradict the observations of Shanholtz at approximately 2:30 p.m., with regard to Parks' inability to stop the vehicle in question. I find Shanholtz' testimony with regard to his observations sufficient to establish a violation of

section 57.9003, supra, which, in essence, requires mobile equipment to have "adequate brakes." Shanholtz' testimony with regard to the issue of significant and substantial was essentially the same as presented in Citation Nos. 3253336, 3253340, and 2861242, infra. Aside from Shanholtz' indication that the vehicle was being operated over uneven terrain, there was insufficient evidence presented as to the speed at which the vehicle was operated, the presence of dangerous obstructions or drop-offs, nor was there presented any detailed description of the terrain. Further, I note that Shanholtz did not check the brake reservoir, and Williams testified that after the Citation the booster system still contained 300 pounds, which indicates that it was not depleted. This testimony has not been contradicted. Hence, I must conclude that it has not been established that a reasonably serious injury was reasonably likely to occur as a consequence of the impaired braking of the vehicle in question. Accordingly, it has not been established that the violation herein was significant and substantial. Essentially for the reasons I discussed in Citation Nos. 3253336, 3253340, and 2861242, I find that a penalty herein of $200 is appropriate.

Citation No. 2861248.

Shanholtz indicated that access to a clutch on the crusher used to energize a diesel drive, was only by crawling under a V-belt which would subject one to being immediately killed, or coming behind the crusher where one would be exposed to unsure footing and V-belts. Shanholtz indicated that, on August 17, 1988, two employees were present, one whose first name was identified as Arnold, and Parks. Shanholtz indicated that Arnold demonstrated for him access to the clutch by crawling under the belt, and that Parks demonstrated access by going behind the crusher. Neither Shanholtz, nor Denton, who was present, recalled seeing any steps going up to the platform where the clutch was located. Denton indicated that, on August 17, he was on the platform. He indicated he did not go up any steps to reach it and did not recall seeing any steps. He indicated he got off the platform by jumping off. Shanholtz issued a Citation alleging a violation of 30 C.F.R. § 11081 which provides that "Safe access shall be provided and maintained to all working places."

Exhibit B, which, according to Respondent's Vice President Jeffrey T. Staton, indicates the crusher in question, clearly depicts steps going up to the platform on which the clutch was located. According to Staton's testimony the crusher was installed in 1984, and always had steps on it. Staton indicated that Exhibit B depicts steps the same way they were located on August 17, 1988.

Based on observations of Staton's demeanor, I find, that as depicted on Exhibit B, there were steps on August 17,1988, leading to the platform on which a clutch was located. There is no evidence that this means of access was not safe. Accordingly, I find that it has not been established that there has been a violation herein of section 57.11001, supra. For these reasons Citation No. 2861248 should be dismissed.

ORDER

It is ORDERED that Citation Nos. 3253179, 3253131, 3253338, 2861244, 2861248, 3253127, 2861249, 3253324, and 2861250 be DISMISSED. It is further ORDERED that Citations 3553336, 3253340, 2861242, and 20612147 shall be amended to reflect the fact that the violations cited therein are not significant and substantial. It is further ORDERED that, within 30 days of this Decision, Respondent pay $820 as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 14 1989

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 88-245-R
	:	Citation No. 2885765; 6/2/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine

DECISION

Appearances: Joseph A. Yuhas, Esq., Ebensburg, Pennsylvania, for Contestant, Rushton Mining Company (Rushton); Anita Eve, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent, the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Rushton filed a notice contesting the issuance of a citation on June 2, 1988, under section 104(a) of the Federal Mine Safety and Health Act of 1977 (Act), charging a violation of 30 C.F.R. § 75.305. It also contests the designation of the violation as significant and substantial. The time for abatement was originally established at June 3, 1988, but this date was extended by a series of continuation orders to March 31, 1989. The record does not show whether the citation has been terminated. A penalty had not been asesssed for the alleged violation as of the hearing date. Pursuant to notice, the case was called for hearing in Bellefonte, Pennsylvania on April 12, 1989. Inspector Donald Klemick testified on behalf of the Secretary. Raymond G. Roeder, James A. Strenko, Charles Hockenberry and Robert Supco testified on behalf of Rushton. The parties were afforded the opportunity to file posthearing briefs. Rushton filed such a brief; the Secretary did not. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. Rushton is the owner and operator of an underground coal mine near Johnstown, Pennsylvania, known as the Rushton Mine. Rushton is a subsidiary of Pennsylvania Mines Corporation.

2. The Rushton Mine is a very wet mine and has always had water problems. Approximately 6 million gallons of water are pumped out daily, and in very wet weather as many as 12 million gallons are pumped out.

3. The return air courses in the subject mine contained at least three "water holes," i.e., areas where the mine floor was covered with water. The air courses had been mined between 1977 and the early 1980's.

4. The area marked as water hole No. 1 on the mine map (Joint Ex. 1) was covered with water approximately 16 inches deep. The water in the area of water hole No. 2 was somewhat more than 16 inches deep. At water hole No. 3, the water was approximately 4 feet deep.

5. The length of the area covered by water hole No. 1 was approximately 40 feet; that covered by water hole No. 2 approximately 40 feet; and that covered by water hole No. 3 approximately 150 to 180 feet.

6. The subject mine liberates methane, but there is no evidence in the record as to the amount. Since 1981, there has been one methane ignition at the mine, in July 1981.

7. The return air course is normally examined weekly by Rushton, using two examiners, each examining one portion of the air course. The area including water holes 1 and 2 is examined by one examiner; that including water hole 3, by another.

8. On May 30, 1988, 1/ mine examiner Charles Hockenberry examined the return air course from the West Main hill (near water hole No. 1) to the Two North Area (beyond water hole No. 2). The area that he examined covered four bleeder evaluation points (BE's).

1/ Hockenberry testified that he performed the examination on June 30, 1988, but the context makes it clear that he meant May 30, 1988.

9. Hockenberry recorded his initials, the date and time at date boards located at BE 20, BE 21, BE 3, BE 4, and at an old regulator at or near water hole No. 2. All of these locations were in the return air course, and the initials, date, and time were intended to show that he examined the return air course and the bleeders.

10. Hockenberry was able to walk through water hole No. 1 which was of a depth that it reached the top of his boots. He walked into water hole No. 2 and examined the roof and ribs visually across the water hole. From where he stood, it was approximately 20 feet to the far water's edge. He examined the other side of the water hole at the water's edge.

11. On June 2, 1988 (during the midnight shift), mine examiner James Strenko examined the return air course from the Two North Switch to an area beyond water hole No. 3.

12. Strenko walked into the water at water hole No. 3, but the water was too deep to traverse the area. He tested the roof, did ventilation and methane tests, and checked for oxygen deficiency. He could see part of the way across the water (approximately 200 feet) and thought he could see across the entire surface.

13. Strenko failed to record his initials, the date and time at the No. 3 waterhole. He travelled around the area, came back to the return entry, and examined the other side of the water hole at the water's edge. He did not record his initials, the date and time at that side of the water hole.

14. On June 2, 1988, Federal Coal Mine inspector (ventilation specialist) Donald J. Klemick was assisting in the AAA inspection of the entire Rushton Mine. He was accompanied by Kent Fenush, company Safety Inspector and Greg Archer, representative of the miners. The inspection team proceeded down the return air course past three or four bleeder evaluation points to water hole No. 1. Fenush had been with Rushton only a short time. He was not familiar with the areas inspected. Neither Fenush nor Archer were called as witnesses.

15. Inspector Klemick found examiner's initials dated May 23, 1988, but did not find any initials dated after May 23, 1988. Nor were Fenush or Archer able to find any more recent initials. No initials were seen at the water's edge of water hole No. 1.

16. After by-passing the water hole, Klemick came back to the return air course. He found no initials at the other edge of the water. He did find a date, May 30, 1988, at bleeder

evaluation point No. 4, but no initials. Bleeder evaluation point 4 is between water holes 1 and 2. The inspection team proceeded to water hole 2 which they found impassible, filled with water and "yellow boy." They went around the area and reentered the return proceeding to water hole No. 3.

17. Water hole No. 3 was very deep and extended a distance of about 180 feet.

18. After exiting the mine, Inspector Klemick checked the examination records at the mine office. These showed that the examinations had been made May 30, 1988, by Hockenberry.

19. After Klemick left, Rushton's Superintendent, Robert Supko, had his third shift foreman check for the initials. He was accompanied by a UMWA belt examiner. Five locations were found containing date boards with Hockenberry's initials, the date May 30, 1988, and the time written on them. The Superintendent had one board brought out of the mine to show Klemick when he returned.

DISCUSSION

Although the inspector did not find any evidence (initials, date and time), that the return air course had been inspected within the prior seven days, I accept the testimony of Hockenberry and Strenko that such inspections were actually made, Hockenberry's on May 30, 1988 and Strenko's before 8 a.m., on June 2, 1988. I further accept the testimony of Hockenberry, corroborated by Superintendent Supko, that he placed his initials, the date and time at five locations along the return aircourse on May 30, 1988. Strenko was uncertain as to whether he placed his initials and the date and time of his examination on June 2, 1988. I find that he did not.

20. On October 29, 1987, MSHA Administrator for Coal Mine Safety and Health issued a memorandum to MSHA District Managers which, among other things, stated:

> Section 75.305 requires weekly examinations of air courses and other areas by a certified person. Modification of these requirements where a roof fall has occurred, or where an area is unsafe for travel, can be achieved only through the petition for modification procedures . . . . (GX 2).

21. Inspector Klemick issued a citation alleging a violation of 30 C.F.R. § 75.305 because the West Mains return air course was not being examined in its entirety. The citation charged that there were three areas of standing water and that

the evidence indicates they were being by-passed. In addition there was no evidence of dates, times, and initials present to indicate that the return aircourse was being examined at intervals not exceeding seven days.

22. The citation was continued while water was being removed from water hole 1 and 2 and a bridge was constructed over a portion of water hole 2. Rushton filed a petition for modification with respect to the area covered by water hole 3.

REGULATION

30 C.F.R. § 75.305 provides in part as follows:

> In addition to the preshift and daily examinations ..., examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person ... in the return of each split of air where it enters the main return ..., at least one entry of each intake and return aircourse in its entirety .... The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly.
>
> * * *

ISSUES

1. Whether, within seven days of June 2, 1988, examinations by certified persons were made in the return air course of the West Mains of the Rushton Mine?

2. Whether, if such examinations made, the person(s) making the examinations placed their initials, and the date and time at the places examined?

3. Whether, if a violation is established, it was significant and substantial?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the act in the operation of the Rushton Mine. I have jurisdiction over the parties and subject matter of this proceeding.

2. The required weekly examinations of return air courses do not mandate that the examiner walk the entire area, but he

must be able to adequately examine the entire area for hazardous conditions and for compliance with mandatory health and safety standards.

3. With respect to the water holes involved in this proceeding, I conclude that the examiner adequately examined the area of water hole No. 1 (he walked through the water hole) and water hole No. 2. In the latter instance, he made methane tests at the water's edge and was able to adequately examine the roof and ribs by sighting over the water--a distance of about 20 feet. I further conclude that the examiner was unable to adequately examine the area of water hole No. 3. The water hole was impassible, and it was not possible to adequately examine the roof and ribs by sighting over a distance of 180 feet.

4. I conclude, based on my finding of fact No. 9, that the examiner placed his initials and the date and time at the places examined in the areas covering water holes 1 and 2.

5. I conclude, based on my finding of fact No. 13, that the examiner did not place his initials and the date and time at the places examined in the area covering water hole 3.

6. Therefore, I conclude that a violation of 30 C.F.R. § 75.305 has been established to the extent that an adequate examination was not made of the area covered by water hole 3 and the examiner failed to place his initials and the date and time of the examination in that area.

7. There is no evidence in the record that the violation was reasonably likely to result in an injury of a reasonably serious nature. Therefore, the citation was improperly designated as significant and substantial.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 2885756 issued June 2, 1988, is AFFIRMED to the extent that it charges a violation of 30 C.F.R. § 75.503 for failure to examine that portion of the return air course which includes water hole No. 3, and failure to record the examiner's initials and the date and time of examination at that area.

2. The citation is MODIFIED to eliminate the designation of the violation as significant and substantial.

3. The Notice of Contest is therefore GRANTED in part and DENIED in part.

James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 14 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 89-2-M A.C. No. 30-00006-05525
v.	:	Blue Circle Atlantic, Inc.
BLUE CIRCLE ATLANTIC, INCORPORATED, Respondent	:	

DECISION

Appearances: Jane Snell Brunner, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York for Petitioner;
Paul Gardner, Labor Relations/Safety Manager, Blue Circle Atlantic, Inc., Ravena, New York, and Mark A. Lies, II, Esq., Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Blue Circle Atlantic, Incorporated (Blue Circle) with one violation of the regulatory standard at 30 C.F.R. § 56.14006. The general issue before me is whether Blue Circle violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2630320, issued pursuant to section 104(a) of the Act, alleges a "significant and substantial" violation and, as amended, charges as follows:

> An employee was required to apply speedi-dry to a take-up pulley drive on the No. 1 main conveyor to prevent the pulley from slipping. The guard was open and the conveyor was running during the

application process which occurred at 4:05 pm, 6-30-88 on the second shift.

The cited standard requires that "[e]xcept when testing the machinery, guards shall be securely in place while the machinery is being operated."

At hearing Blue Circle conceded that a violation occurred but maintained that it was caused by the unauthorized actions of a non-supervisory employee, Michael Carrano and, presumably, that it was accordingly without negligence.

Former Blue Circle employee Michael Carrano testified that before his retirement on March 31, 1989, he had worked more than 23 years for Blue Circle. At the time of the alleged violation he was working as a utility man, cleaning, aligning and maintaining the No. 1 belt. Carrano described the belt, which transports rock and stone, as 3 to 4 feet wide and running about 3,000 feet in each direction.

Carrano testified that on June 30, 1988, a "spin-out" occurred on the No. 1 belt caused by wet conditions. A "spin-out" results from slippage between the drive pulley and the belt causing the belt to slow down or stop. Spin-outs are corrected by feeding scoops of a substance known as "speedi-dry" onto the pulley as it rotates thereby providing friction between the pulley and the belt.

According to Carrano it had been the established procedure for as long as 20 years to correct a spin-out by first removing the guard surrounding the belt pulley and then calling the crusher operator by mine telephone to stop the belt. An initial quantity of speedy-dry would then be scooped onto the pulley and the belt started. Additional speedy-dry would then thrown onto the rollers as the pulley is rotated. Since the wire mesh on the guard was too fine to enable any significant application of speedi-dry to the rollers it was found to be necessary to remove the guard before application. Carrano testified that he had been taught this procedure by his foreman Ray Shove. Other Blue Circle employees including union committeeman Richard Boice, crusher operator Arnold Schieren, Jr., Martin Powell, and crusher operator Edward Smith, confirmed that these procedures had been followed at the plant for years. The testimony of Boice is also undisputed that he warned Lloyd Shove within six months before the incident at issue and also the current superintendent about the inability to apply speedi-dry through the existing mesh guard. He informed both that it was therefore necessary for the employees to open the

guard and apply the speedi-dry onto the moving belt. It is further undisputed that these officials admitted to Boice they knew they had a problem and were planning on correcting it in September 1988.

According to Carrano, several months before June 30, 1988, the Blue Circle employees were warned by company officials to no longer remove the guard. On June 30, 1988, another spin-out occurred because of rain. Carrano's foreman, John Zubris, told Carrano by telephone to get the belt running. What happended next was described at hearing by Carrano in the following colloquoy:

> Q [By Government Counsel] Now, on June 30th, 1988 after the belt spun out, tell us precisely what happened.
>
> A [By Carrano] Well, at this time the belt spun out -- this happend after we had orders not to open that guard, and not to open that guard under no circumstances, you'll be fired. So, the belt spun out and I realized I couldn't get speedi-dry in there. So I called my foreman, John Zubris, told him I can't ***
>
> And I told him I can't feed speedi-dry in cause I can't take the guard off. He said, "Well, I want the belt running." I said, "I can't." He said, Mikey, get that belt running." I said John, I can't." I said, "I can't take the guard off because I'll be fired."
>
> So, he says, "Mike, get your wrench, take that nut off there." He said, "Don't let me come up those "f-ing" stairs and have to do it. Get that belt running."
>
> So meanwhile I got my wrench -- well, I did ask him, I said, "If I take this guard off, would you back me up on this?" He said, "yep." I took the guard off. He come up while I was taking the guard off, and before I fed speedi-dry on the belt he left.
>
> Then I proceeded to throw speedi-dry on there, and I had the crusher operator on the phone and I told him to start it, and as he started I kept feeding it, and we got the belt running. So, I didn't think this was a very good idea, so I told Dick

Boice [the union representative] about it. (Tr. 16-18).

Boice recalled that on June 30, 1988, Carrano indeed called him on the mine telephone. Carrano had been confronted by Zubris and was agitated. Boice overheard Zubris "screaming at the top of his lungs" on the phone ordering Carrano "you'll do what I tell you, when I tell you, and I don't care if you like it or not".

Inspector William Prehoda of the Federal Mine Safety and Health Administration (MSHA), issued the citation at bar based upon Carrano's statements that Zubris directed him to perform the cited procedure. Prehoda described the hazard as follows:

> by putting speedi-dry on with the scoop -- and this is what Mike Carrano stated he had the guard open and he was putting speedi-dry on with a scoop, and... the conveyor was running, and this by being the pinch points it could have caught his arm and probably pulled his arm off, or even himself got thrown into the pulleys so, in other words, it was an unsafe act ...

This unchallenged testimony is minimally sufficient to support an inferential finding that the violation was "significant and substantial" and serious. See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Prehoda also opined that the operator was highly negligent because "it was done quite frequently and it should have been corrected". In this regard Prehoda credited Carrano's statement that he had been directed to perform the violative act by his foreman John Zubris. Prehoda therefore necessarily discredited Zubris' statement to him that while he had directed Carrano to throw the material onto the pulley he also told Carrano to close the guard before running the belt. However upon close examination of the testimony of Carrano and Zubris and of those additional persons present at the meeting on July 1, 1988, i.e. Boice and Schucker, I am satisfied that Zubris did not in fact instruct Carrano specifically to throw speedi-dry onto the belt with the guard open while the belt was moving. Zubris' instructions were of course admittedly in violation of the company's March safety directive against opening the guard without the belt being locked-out. Carrano may have accordingly been seriously concerned by Zubris' order but I do not find that Zubris directly ordered Carrano to violate the cited standard.

Blue Circle is not however without negligence. The evidence shows the existence of a long standing practice of many years during which speedi-dry was applied to a moving pulley with its guard open. In spite of the company memo issued in March 1988 ostensibly prohibiting the practice, management knew that the only effective application of speedi-dry was with the guard open. It is undisputed that Boice so informed several company officials and was told only that the problem would not be corrected until September 1988. Thus while Carrano may not have been directly ordered to perform the cited violative act, he was nevertheless placed in a position by Zubris' orders (to get the belt running) of being compelled to commit the violative act because it was within the knowledge of management that the only way to get the belt running under the circumstances was to apply the speedi-dry onto the moving belt with the guard open. This compulsion under the circumstances constitutes high negligence.

Considering the criteria under section 110(i) of the Act I find that a civil penalty of $400 is appropriate.

ORDER

Blue Circle Atlantic, Inc. is hereby directed to pay a civil penalty of $400 within 30 days of the date of this decision.

Gary Mellick
Administrative Law Judge
(703) 756-6261

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JUL 18 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-82
	:	A.C. No. 15-13469-03696
v.	:	
	:	No. 9 Mine
GREEN RIVER COAL CO., INC., Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary);
Mr. William Craft, Madisonville, Kentucky, for Green River Coal Co., Inc. (Green River).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for two alleged violations of mandatory safety standards: one charges a violation of 30 C.F.R. § 75.1710 because a scoop allegedly used inby the last open crosscut was not provided with a canopy; the other charges a violation of 30 C.F.R. § 75.503 because of a permissibility violation on a loading machine. Pursuant to notice the case was heard in Owensboro, Kentucky on June 7, 1989. George Newlin testified on behalf of the Secretary. Mike McGregor testified on behalf of Green River. The parties waived their right to file post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

FINDINGS RELATING TO BOTH CITATIONS

Green River is the owner and operator of an underground coal mine in Hopkins County, Kentucky, known as the No. 9 Mine. The mine is moderately large: it produces over one million tons of coal annually, and employs approximately 200 workers. During the 24 month period from October 28, 1986 to October 27, 1988, the mine was cited for 1,057 violations of mandatory safety and

health standards; 10 of these were for violations of 30 C.F.R. § 75.1710; 74 were for violations of § 75.503. This is a substantial history of prior violations, and if violations are found herein, the penalties will be increased because of it. The violations cited herein was promptly abated in good faith after the citations were issued.

CITATION 3297516

On October 28, 1988, at about 5:25 a.m., Federal Coal Mine Inspector George Newlin issued the subject citation while making a regular inspection of the No. 9 Mine. The mine was not producing coal during the midnight shift, and only maintenance work was being performed. The inspector came upon a scoop in the No. 2 unit, about three crosscuts outby the face. The scoop was at the charging station being charged. Since it was being charged, it was deenergized. The canopy had been removed from the scoop. The height of the coal was approximately 50 inches. The roof condition in the subject mine is not good. The mine has experienced a large number of unexpected roof falls.

The scoop was not locked or tagged out. Inspector Newlin was accompanied by company safety inspector (now safety director) Mike McGregor, and Union representative Jarvis. Both McGregor and Jarvis said the scoop was a unit scoop and was used for cleanup at the coal face. McGregor said he was surprised that it did not have a canopy.

Green River has a number of scoops, all of them electric powered. Those used at the face are provided with canopies; those used outby are not. I find as a fact that the scoop cited herein was regularly used at the face. Its canopy had been removed and not replaced. The next production shift was to begin work at about 8:25 a.m. on October 28, 1988.

The violation was abated by replacing the canopy on the scoop in question. The citation was terminated October 31, 1988.

CITATION 3297518

On October 28, 1988, at about 6:00 a.m., Inspector Newlin found an opening in a control panel of a loading machine to be in excess of the permissibility limit (the opening was .005 inch; .004 inch is the limit permitted). The loader was not energized, the mine was on the maintenance shift and not producing coal. The loading machine was in the entry at the last open crosscut. It had a permissibility plate or label and had been used and was intended to be used in the production of coal. The subject mine liberates in excess of 700,000 cubic feet of methane per day. At

the time the citation was issued, the inspector found between .2% and .3% methane. The air was good.

The violation was abated by tightening the bolts on the control panel and closing the gap to within .004 inch. The citation was terminated at 6:30 a.m., October 28, 1988.

REGULATIONS

30 C.F.R. § 75.1710 provides as follows:

> An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies, or cabs, to protect the miners operating such equipment from roof falls and from rib and face rolls.

30 C.F.R. § 75.503 provides as follows:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

ISSUES

1. Whether the Secretary can cite an operator for failure to have a canopy on electric face equipment without observing the equipment being operated at the coal face?

2. Whether the facts establish a violation of 30 C.F.R. § 75.1710?

3. Whether the Secretary can cite an operator for a permissibility violation at a time when the cited electric face equipment is not being operated, i.e., when the section is idle?

4. Whether the facts establish a violation of 30 C.F.R. § 75.503?

5. If the violations are established, whether they were significant and substantial?

6. If the violations were established, what are the appropriate penalties?

CONCLUSIONS OF LAW

JURISDICTION

Green River is subject to the provisions of the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

CANOPY ON SCOOP

Section 104(a) of the Act provides that if upon inspection an authorized representative of the Secretary believes that an operator of a coal mine has violated the Act or any mandatory safety stadard, he shall issue a citation to the operator. The statute does not require that the authorized representative observe the violative condition; he need only believe that a violation occurred. In the present case, I have found as facts (1) the scoop was present in the section and did not have, as the regulations required, a canopy to protect the scoop operator; (2) the inspector was informed by representatives of the miner and by a union miner that the scoop was a "unit scoop used on the unit for cleanup." (Tr. 11); (3) the mine produced coal on the shift prior to the inspection and expected to produce coal on the shift subsequent to the inspection. Based on these facts, the inspector reasonably believed that a violation occurred. I conclude that the scoop was an item of electric face equipment and required a substantially constructed canopy. A violation of 30 C.F.R. § 75.1710 has been established.

The subject mine has a history of roof falls. The roof is not a stable roof. The operation of electric face equipment without a canopy is reasonably likely to result in serious injury. I conclude that the violation was significant and substantial. The absence of the canopy on the scoop was obvious. It had been removed for some unknown reason. I conclude that the violation resulted from Respondent's negligence. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $250.

PERMISSIBILITY VIOLATION

30 C.F.R. § 75.503 requires an operator to maintain in permissible condition all electric face equipment which is taken into or used inby the last open crosscut. Neither the Act nor the regulations require that the inspector observe the equipment actually being operated inby the last open crosscut. Such a requirement would defeat the whole purpose of the regulation. There is no question that the loader was electric face equipment. There is no question that it had been operated inby the last open crosscut. It was in fact in the entry at the last open crosscut

when cited. It was not contested that the equipment was not permissible. I conclude that a violation of 30 C.F.R. § 75.503 was established.

Because the subject mine liberated considerable methane the violation was serious. It was reasonably likely to cause serious injury to miners. Therefore the violation was significant and substantial. The condition could have been found on weekly examination, but there is no evidence that it existed at the time of prior weekly exam: it could have resulted at any time from vibrations, etc. Therefore, I cannot conclude that it resulted from Green River's negligence. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $150.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citations 3297516 and 3287518 are AFFIRMED.

2. Respondent shall within 30 days of the date of this decision pay $400 as civil penalties for the violations found herein.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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JUL 18 1989

ROCHESTER & PITTSBURGH COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 88-164-R
	:	Citation No. 2879230; 3/7/88
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Greenwich Collieries No. 2 Mine
	:	Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-288
	:	A. C. No. 36-02404-03723
v.	:	
	:	Greenwich Collieries No. 2 Mine
ROCHESTER & PITTSBURGH COAL COMPANY, Respondent	:	

DECISION

Appearances: Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal Company, Ebensburg, Pennsylvania, for the Operator; Mark D. Swartz, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary (Petitioner) seeks a civil penalty for alleged violations by the Operator (Respondent) of 30 C.F.R. § 75.301, and the Respondent has contested the violation, and alleges that the underlined citation be vacated. Subsequent to notice, these cases were scheduled and heard on March 1, 1989, in Bellefonte, Pennsylvania. At the hearing, Samuel J. Brunatti and James E. Biesinger testified for the Petitioner, and Mike A. Ondecko testified for Respondent. The Petitioner filed Proposed Findings of Fact and Supporting Memorandum on June 21, 1989, and Respondent filed a Post-Hearing Brief on June 20, 1989.

On June 21, 1989, Petitioner filed a Motion to Amend the Transcript. This Motion was not opposed and it is GRANTED.

Stipulations

The Parties have agreed to the following stipulations:

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation, and managed by Respondent, Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citation was properly served, by a duly authorized representative of the Secretary of Labor, upon an agent of the Respondent at the dates, times, and places stated herein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The Respondent demonstrated good faith in the abatement of the citation.

6. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business, should be based on the fact that:

a. The Respondent company's annual production tonnage is 10,554,743.

b. The Greenwich Collieries No. 2 Mine's annual production tonnage is 1,195,419.

8. That Greenwich Collieries No. 2 mine was assessed 1,013 violations over 1,053 inspection days during the 24 months preceding the issuance of the subject violation.

9. The Parties stipulate to the authenticity of their exhibits, but not their relevance, nor to the truth of the matters asserted therein.

10. On March 7, 1988, MSHA Inspector Samuel J. Brunatti took air bottle samples at bleeder evaluation point No. 35, and at a crosscut outby bleeder evaluation point No. 35 at Greenwich Collieries No. 2 Mine.

11. On March 30, 1988, MSHA Inspector, Nevin J. Davis took air bottle samples at bleeder evaluation point Nos. 4, 16, 17, and 19 at Greenwich Collieries No. 2 Mine.

12. The air samples taken by Inspectors Brunatti and Davis were analyzed at the MSHA Laboratories at Mt. Hope, West Virginia.

13. The Parties stipulate to the following with respect to the analyses of the air samples at the MSHA Laboratories:

a. The analyses were in accordance with proper scientific protocol.

b. The samples were not altered in any way from the times they were taken through the end of their analyses.

c. The results obtained accurately reflect the volume per centum of carbon dioxide in the air at the respective sampling locations on March 7 and 30, 1988.

14. The Parties stipulate to the authenticity and admissibility of the two documents entitled Table-1 Analyses of Air Bottle Samples collected on March 7, 1988, and Table-1 Analyses of Air Bottle Samples collected on March 30, 1988.

Findings of Fact and Discussion

On March 7, 1988, air bottle samples taken by MSHA Inspector Samuel J. Brunatti at bleeder evaluation point No. 35, at a crosscut at approximately 20 to 30 feet outby bleeder evaluation point No. 35, bleeder evaluation point No. 17, and bleeder evaluation point No. 19, all revealed carbon dioxide levels in excess of the maximum of 0.5 volume percent permitted by 30 C.F.R. § 75.301. The critical issue presented before me is whether § 75.301, supra, is applicable to the cases at bar.

30 C.F.R. § 75.301, is applicable to "all active workings." Petitioner makes reference to 30 C.F.R. § 75.2, which, for proposes of part 75 of 30 C.F.R., defines "active workings," as . . . . "any place in a coal mine where miners are normally required to work or travel." In this connection, Petitioner, in arguing that the cited areas were active workings, refers to stipulation No. 16, which indicates that the evaluation points in question were examined weekly by a certified person in accordance with 30 C.F.R. § 75.305 and 75.316. Petitioner further refers to the opinion of Brunatti and James Biesinger, an MSHA Supervisory Inspector, that in certain circumstances, an operator may need to monitor bleeder evaluation points more frequently than once a

week, sometimes even continuously. In addition, Petitioner refers to the testimony of its witnesses that, if in the area water accumulates or the roof deteriorates or the wall crushes, conditions termed by Brunatti to be not unusual to Respondent's method of extracting coal by retraction, workers would have to travel to the areas in question to repair these conditions. Also, Brunatti indicated that on quarterly and 103(i) spot inspections, inspectors are accompanied by miners who are Union Representatives, and might also be accompanied by miners who are company representatives. As such, Petitioner contends that miners are required to travel and work in the cited areas and hence these areas should be considered "active workings," and be subject to the terms of § 75.301, supra. For the reasons that follow, I do not find merit in Petitioner's arguments.

I find, based on Brunatti's testimony and the ventilation map (Exhibit J-2B), that air coming off the gob goes outby down a bleeder entry to the various bleeder evaluation points. The air in this entry then continues outby the gob until it meets and mixes with the return air that has flowed into this entry. The entries in which the bleeder evaluation points were located are perpendicular to the return entries, and appear to deliver air from the gob to the return air entries. Thus these entries, at least until the bleeder evaluation points, are to be considered bleeder entries within the purview of 30 C.F.R. § 75.316-2(e)(1) which defines bleeder entries as ". . . special air courses developed and maintained as part of a mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses." Indeed, Brunatti indicated on cross-examination that the bleeder evaluation point No. 35 was in the bleeder entry. It would appear that this comment would also be appropriate to the other bleeder evaluation points in issue, as they are part of the same ventilation scheme.

Brunatti indicated that the area from which he took the sample from outby bleeder evaluation point No. 35, was not in a bleeder entry. However, he indicated that this site was the mixing point between air coming off the gob and air entering from the return entries. As such, it would appear that this testing point is to be considered part of the bleeder system within the purview of 30 C.F.R § 75.316-2(e)(2) which, in essence, includes in the bleeder system any combination of bleeder entries and bleeder entry connections ". . . to any area from which pillars are wholly or partially extracted . . . ." Section 75.316-2(e)(2), supra, continues to provide that the bleeder systems extend ". . . to the intersection of the bleeder split with any other split of air." Accordingly, I conclude that both the bleeder evaluation points and the area tested by Brunatti

20 to 30 feet outby bleeder evaluation point No. 35, are all part of the bleeder system. Inasmuch as I have found the bleeder evaluation points and the other area tested by Brunatti to be part of the bleeder system, I must conclude that they are not active workings, as section 75.316-2(e)(2) indicates that the bleeder systems ". . . shall not include active workings."

In U.S. Steel Corporation 6 FMSHRC 291 (1984), Judge Koutras was presented with the issue as to whether carbon dioxide readings in excess of .5 percent taken at a bleeder evaluation point, were violative of section 75.301, supra. Judge Koutras, at 307, supra, concluded that Contestant's argument was sound and logical that ". . . when read together with the other standards found in part 75, a bleeder entry is not active workings . . . ." Further, Judge Koutras found, in essence, the fact that a certified examiner must travel to the bleeder evaluation points once a week to make an inspection, does not place these points within the purview of section 75.301, supra. I believe that Judge Koutras' decision is well founded and choose to follow it.

Petitioner's witnesses testified that it would not be unusual for conditions to occur in the bleeder entries requiring miners to enter those entries to perform the repair work. In the absence of evidence as to the specific practice of Respondent, in the sections at issue, in requiring miners to work in the areas in question, I find the testimony to be insufficient to establish that miners are "normally" required to work or travel in those areas. (c.f. Secretary v. Jones and Laughlin Steel Corporation 8 FMSHRC 1058, 1063-1064 (1986)).

Therefore, based upon all of the above, I conclude that the location at which the samples in question were taken were not active workings, and as such are not within the purview of section 75.301, supra.[1/] Accordingly, it has not been established that section 75.301, supra, has been violated by Respondent herein.

1/ I do not find merit in Petitioner's argument that, in essence, if section 75.301, supra, is applied to the areas in question, the result will be the protection of the health of examiners and other miners who visit bleeder evaluation points on a normal basis. It has not been established, aside from the opinions of two MSHA Inspectors who testified for Petitioner, that miners are assigned duties in these areas (See, Jones v. Laughlin Steel Corp., 8 FMSHRC 1058 at 1063 (1981). Also it can not be the intent of section 75.301, supra, to protect examiners. To do so would require the evaluation points to be preshifted prior to an examiner's inspection. Even Brunatti has indicated that the area in question need not be preshifted before an examiner enters the area.

ORDER

It is hereby ORDERED that Citation No. 2879230 be VACATED, Docket No. PENN 88-288 be DISMISSED, and the Notice of Contest, Docket No. PENN 88-164-R is GRANTED.

It is further ORDERED that the transcript of the Hearing be AMENDED as set forth in paragraphs 1 - 4 of Petitioner's Motion to Amend the Transcript.

Avram Weisberger
Administrative Law Judge

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JUL 18 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD J. ROBINETTE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 87-21-D
	:	NORT CD 87-5
v.	:	Mine No. 8
BILL BRANCH COAL COMPANY, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOEY F. HALE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 87-22-D
	:	NORT CD 87-7
v.	:	Mine No. 8
BILL BRANCH COAL COMPANY, INC., Respondent	:	

ORDER

Subsequent to a hearing on the merits in these cases, a Decision was issued on September 29, 1988, finding that Respondent discriminated against Complainants in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977. The Decision further ordered as follows: "Complainants shall file a statement, within 20 days of this Decision, indicating the specific relief requested. The statement shall be served on Respondent who shall have 20 days, from the date service is attempted, to reply thereto."

On November 1, 1988, the Secretary filed a statement pursuant to this Order. On November 14, 1988, Respondent filed a statement which indicated that discovery was needed to attempt to resolve the issues of relief. On November 21, 1988, in a telephone conference call both Parties indicated that dispositions would be taken on January 2, 1989. On January 31, 1989, in a conference call with both Parties, the attorney for the Secretary advised that Respondent

had filed, in U. S. Bankruptcy Court, for reorganization pursuant to Title 11 of the U. S. Code. On February 22, 1989, proceedings before the Commission in the instant cases were stayed, pending a determination by the U. S . Bankruptcy Court that the automatic stay therein does not apply. Subsequently, the U. S. Bankruptcy Court issued an order relieving the Secretary from the provisions of the automatic stay. In a conference call on April 16, 1989, between the undersigned and attorneys for the Secretary and Respondent, the Parties agreed to discuss settlement of the issues of Complainants' relief. On April 24, 1989, the attorney for the Secretary advised that a settlement had been arrived at, and that a signed stipulation would be submitted within 30 days. On June 27, 1989, the attorney for the Secretary advised the undersigned that it had not yet received from Respondent a stipulation regarding back pay, although Counsel for Respondent had assured him that the stipulation would be mailed June 17, 1989.

In a telephone conference call between the undersigned and the attorneys for the Secretary and Respondent, it was indicated that Respondent mailed the stipulation to the attorney for the Secretary on June 29, 1989, and the latter indicated the stipulation would be filed on July 10, 1989.

The attorney for the Secretary filed the stipulation on July 13, 1989. The stipulation provides a fair resolution of the amount of Respondent's financial obligation to Complainants pursuant to my Order of September 29, 1988, contained in the Decision filed that date, and I adopt it herein.

It is therefore ORDERED that:

1. The Stay Order of February 22, 1989, is hereby lifted.

2. The liability of Respondent to Complainants is set forth in the stipulation filed July 13, 1989, and it ORDERED that the Parties shall abide by all its terms.

3. The Decision in this matter issued September 29, 1988, is now FINAL.

Avram Weisberger
Administrative Law Judge

Distribution:

Mark Malecki, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Robert J. Breimann, Esq., Street, Street, Street, Scott & Bowman, P. O. Box 2100, Grundy, VA 24614 (Certified Mail)

Robert Copeland, Esq., U. S. Bankruptcy Court, Western District of Virginia, Office of the Clerk, P. O. Box 2390, Roanoke, VA 24010 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

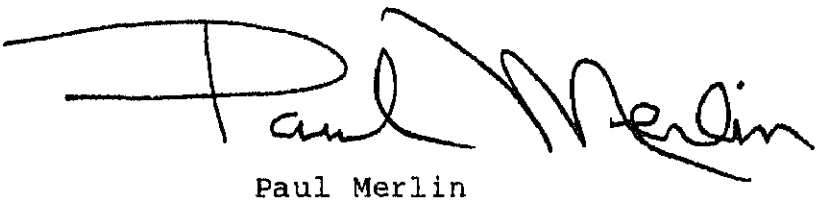
July 24, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 88-260 A. C. No. 36-02685-03506
v.	:	
	:	Coal Junction Coal Company
COAL JUNCTION COAL COMPANY, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

Based upon the Solicitor's motion, this case is hereby DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Therese I. Salus, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Leo M. Stepanian, Esq., Stepanian & Muscatello, 228 South Main Street, Butler, PA 16001 (Certified Mail)

Mr. Robert G. Buchleitner, President, Coal Junction Coal Company, Inc., R.D. #1, Creekside, PA 15732 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 25, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 89-45-M A. C. No. 47-02651-05501
v.	:	
	:	Portable Perz Plant
ARTHUR OVERGAARD-DIV./MATHY CONSTRUCTION COMPANY, Respondent	:	

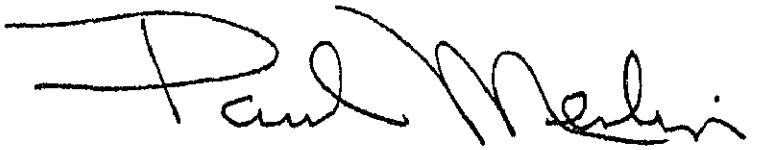
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have submitted a motion to approve settlement of the one violation involved in this case. The penalty was originally assessed at $5,000 and the proposed settlement is for $3,700.

The parties' motion discusses the violation in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The subject citation was issued for a violation of 30 C.F.R. § 56.14001 because the 52-inch, self-cleaning tail pulley, on the crusher discharge belt conveyor, had not been guarded. An employee became entangled at the tail pulley and received fatal injuries. The parties represent that the penalty reduction is warranted because negligence which originally was rated as high, is less than originally thought. According to the Solicitor the operator demonstrated a moderate degree of negligence because it should have known the pulley area of the rock crusher was not guarded properly. However, employees had been directed by the operator not to work or enter the cited area. It is not known why this employee was working in this area. The operator promptly abated the violation. In addition, this is a small operator with no prior history of violations for the preceding two years. Based upon the foregoing representations, I approve the recommended settlement.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $3,700 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

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James Naugler, Esq., Moen, Sheehan, Meyer & Henke, Ltd., Arthur Overgaard-Div./Mathy Construction Company, First Bank Place, Suite 700, Post Office Box 786, La Crosse, WI 54602-0786 (Certified Mail)

Ms. Carol Jensen, Office Manager, P. O. Box 128, Elroy, WI 53929 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 25, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 89-119
	:	A. C. No. 46-01433-03863
	:	
v.	:	Loveridge No. 22 Mine
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 89-120
	:	A. C. No. 46-01453-03845
	:	
	:	Docket No. WEVA 89-121
	:	A. C. No. 46-01453-03846
	:	
	:	Humphrey No. 7 Mine
	:	
	:	Docket No. WEVA 89-122
	:	A. C. No. 46-01968-03794
	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 89-132
	:	A. C. No. 46-01867-03789
	:	
	:	Blacksville No. 1 Mine
	:	
	:	Docket No. WEVA 89-133
	:	A. C. No. 46-01454-03771
	:	
	:	Pursglove No. 15 Mine
	:	
	:	Docket No. WEVA 89-136
	:	A. C. No. 46-01318-03866
	:	
	:	Robinson Run No. 95 Mine

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor U. S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Merlin

The above-captioned cases were the subjects of prehearing hearing orders. Preliminary statements were filed and a

prehearing conference was held on July 10, 1989. When the cases came on for hearing on July 11, 1989, counsel for both parties advised that in one instance the citation was being vacated and that in the others approval for recommended settlements was being sought. Cases other than those captioned above were heard on the merits at the same time.

WEVA 89-119

Section 104(d)(2) Order No. 3106488 was issued for a violation of 30 C.F.R. § 75.303. A preshift examination of a belt conveyor was inadequate. At the hearing the Solicitor advised that evidence at trial would support the MSHA evaluation of high gravity and negligence. The Solicitor further advised that the proposed settlement was for the original assessment of $1,000. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 3105859 was issued for a violation of 30 C.F.R. § 75.202. A utility man was observed under unsupported roof in the 4 left longwall section. The original assessment was $900 and the recommended settlement was $500. The Solicitor explained that the order was being modified to a 104(a) citation and that negligence was reassessed as moderate. According to the Solicitor she could not prove the existence of aggravated conduct as required by Commission precedent for "unwarrantable failure". Quinland Coals, Inc., 10 FMSHRC 705 (June 1988), Southern Ohio Coal Co., 10 FMSHRC 138 (Feb. 1988), Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (Dec. 1987), Emery Mining Co., 9 FMSHRC 1997 (Dec. 1987). The operator's foreman had given the utility man instructions regarding his work and had left the area, for a few minutes, which was when the inspector arrived. The foreman's instructions were general in nature, but could have been carried out by the utility man without exposing himself to the unsupported roof. In light of the foregoing circumstances and mindful of Commission precedent regarding "unwarrantable failure", the recommended settlement was approved from the bench.

WEVA 89-120

Section 104(d)(2) Order No. 3113143 was issued for a violation of 30 C.F.R. § 75.1403. Intermittent locations between shields of a longwall face where men traveled were not kept free of obstructions. Gravity and negligence were rated as high. At the hearing the Solicitor advised that the proposed settlement was for the original assessment of $850. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 3103486 was issued for a violation of 30 C.F.R. § 75.220(a)(1). The approved roof control plan was violated because supplemental supports were not installed where bad roof conditions were present at a return entry.

The original assessment was $750 and the recommended settlement was $550. The Solicitor explained that the reduction from the original assessment was justified because evidence at trial might not support the inspector's initial evaluation of high operator negligence. The inspector thought that chalk marks on broken timbers in the area indicated the preshift examiner's knowledge of the missing supports, but other individuals also had chalk and the examiner denied making these marks on the broken timbers. Based upon the foregoing, I approved the recommended settlement from the bench.

Section 104(d)(2) Order No. 3103488 was issued for a violation of 30 C.F.R. § 75.1103-4(a)(1). Automatic fire sensors were not provided on the 7 North belt for a length of about 450 feet. The original assessment was $750 and the recommended settlement was $170. The Solicitor explained that the order was being modified to a 104(a) citation and that negligence was reassessed as moderate. Further investigation disclosed that the sensors had been deliberately removed from their locations above the belt line and thrown into adjacent crosscuts by unknown persons. The inspector could not establish how long the sensors had been missing and the operator was prepared to offer the testimony of the preshift examiner that all fire sensors were in place when the preshift examination was performed. Accordingly, negligence was less than initially thought and "unwarrantable failure" could not be found in accordance with Commission precedent. In addition, gravity was somewhat less than the inspector first estimated because the operator had in place another system which could detect the by-products of combustion in very small quantities and give a warning to miners working inby the location of the combustion. Based upon the foregoing, I approved the recommended settlement from the bench.

WEVA 89-121

Citation No. 3103498 was issued for a violation of 30 C.F.R. § 75.1403-10(e). This section provides that positive-acting stopblocks or derails should be used where necessary to protect persons from the danger of run-away haulage equipment. Pursuant to an underlying Notice to Provide Safeguards first issued in 1972, MSHA declined to allow a skid to be used as a positive-acting stopblock. In the cited condition three mine cars parked in the fire spur at portal bottom area were blocked with a skid. At the hearing the Solicitor pointed out that a series of administrative law judge decisions over the last several years have been adverse to MSHA on the way it issues safeguards. Beth Energy Mines Inc., 11 FMSHRC 942 (May 1989), Southern Ohio Coal Co., 10 FMSHRC 963 (Aug. 1988), U. S. Steel Mining Co., 4 FMSHRC 526 (March 1982). The Solicitor stated that as a result MSHA is reexamining its policy in this area. In light of the foregoing, the citation was vacated from the bench. The penalty petition is dismissed insofar as this item is concerned.

WEVA 89-122

Section 104(d)(2) Order No. 2708034 was issued for a violation of 30 C.F.R. § 75.1105. The air ventilating the energized power center on an old longwall section was not coursed directly into the return. Gravity and negligence were rated as high. At the hearing the Solicitor advised the proposed settlement was for the original assessment of $950. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 2944372 was issued for a violation of 30 C.F.R. § 75.400. Float coal dust had accumulated on a belt structure and on the water line, and fine coal and dust had accumulated under the bottom belt of the automatic take up unit. The original assessment was $950 and the recommended settlement was $400. The Solicitor explained that the reduction was justified because although the inspector estimated that the conditions took over a month to develop, the operator was prepared to offer evidence that the condition was not present during the preshift and that several MSHA personnel recently had been in the immediate area. The Solicitor did not agree with all the operator's assertions, but she stated she could not dispute the fact that several inspectors had passed through the area within the proceeding few weeks. In addition, the Solicitor could not dispute that the operator was able to abate the violation within 25 minutes of the issuance of the order. Operator's counsel advised that the case was essentially a factual judgment call and not of any precedent-setting nature. In light of the foregoing, the settlement was approved from the bench.

WEVA 89-132

Section 104(d)(2) Order No. 2943736 was issued for a violation of 30 C.F.R. § 75.316. A bleeder evaluation point on a longwall previously approved by a district manager had been changed and relocated by the operator approximately 1000 feet inby. The original assessment was $700 and the recommended settlement was $500. The Solicitor advised that she probably could not prove that the violation was significant and substantial. She stated that the evidence at trial would demonstrate that the district manager eventually approved the new location used by the operator as the bleeder evaluation point. Although there is uncontroverted evidence that the gob on the longwall was not being ventilated as intended by the ventilation plan and that the direction of the airflow had reversed, the Solicitor stated she could not demonstrate the failure of the operator to obtain the district manager's approval for the new bleeder evaluation point resulted in a reasonable likelihood of the hazard resulting in an injury. In light of the foregoing, the settlement was approved from the bench.

WEVA 89-133

Section 104(d)(2) Order No. 3103459 was issued for a violation of 30 C.F.R. § 75.400. Combustible material in the form of loose coal, coal dust, and float coal dust had accumulated under the bottom belt between the tension rollers and under the drive unit of a drive belt. Gravity and negligence were rated as high. At the hearing the Solicitor advised that the proposed settlement was for the original assessment of $900. Operator's counsel did not object. The settlement was approved from the bench.

Section 104(d)(2) Order No. 3103460 was issued for a violation of 30 C.F.R. § 75.303. Adequate preshift examinations had not been made on certain belts. The original assessment was $1,000 and the recommended settlement was $700. The Solicitor advised the reduction was justified because evidence at trial might not support the inspector's evaluation of the operator's negligence. Although there is no doubt that there were hazardous conditions and violations, MSHA's witness had no first hand knowledge of the extent of these hazardous conditions during the preshift examination and could only have expressed the opinion that the conditions were obvious at the time of the preshift examination. The operator would offer testimony of the preshift examiner to controvert the Secretary's opinion evidence. In light of the foregoing, the settlement was approved from the bench.

WEVA 89-136

Section 104(d)(2) Order No. 3119427 was issued for a violation of 30 C.F.R. § 75.202(b). According to the Solicitor the approved roof control plan was not being complied with because supplies were being stored in the face of the heading by persons who traveled under unsupported roof. Operator's counsel expressed the view that miners were not under unsupported roof but he did not believe this case was an appropriate vehicle to test this issue which is being presented in other cases. The Solicitor advised that the proposed recommended settlement was for the original assessment of $1,000. Operator's counsel did not object. The settlement was approved from the bench.

ORDER

It is ORDERED that Order Nos. 3105859 and 3103488 be MODIFIED to 104(a) citations.

It is further ORDERED that Citation No. 3103498 be VACATED.

In light of the foregoing, it is further ORDERED that the proposed settlements be APPROVED and the following amounts be ASSESSED:

Citation or Order No.	Amount
3106488	$1,000
3105859	$ 500
3113143	$ 850
3103486	$ 550
3103488	$ 170
3103498	VACATED
2708034	$ 950
2944372	$ 400
2943736	$ 500
3103459	$ 900
3103460	$ 700
3119427	$1,000
	$7,520

It is further ORDERED that the operator PAY $7,520 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 27 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 89-54-M
	:	A.C. No. 16-00970-05610-A
v.	:	
	:	Docket No. CENT 89-60-M
CARL A. JOHNSON, Employed by MORTON SALT DIVISION/ MORTON THIOKOL INC., Respondent	:	A.C. No. 16-00970-05613-A
	:	Morton Salt Weeks Island Mine

DECISIONS APPROVING SETTLEMENTS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the individually named respondent pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, for allegedly "knowingly" authorizing, ordering, or carrying out, two alleged violations of certain mandatory safety standards found in Part 57, Title 30, Code of Federal Regulations. The respondent has filed answers to the proposals, and the petitioner has filed a settlement motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a proposed settlement of the cases. The violations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. CENT 89-54-M

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2866484	08/25/87	57.9003	$400	$200

Docket No. CENT 89-60-M

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2866117	08/25/87	57.11050	$400	$200

Discussion

In support of the proposed settlement disposition of these cases, the petitioner has submitted information pertaining to the civil penalty criteria found in section 110(i) of the Act. Additional information provided by the petitioner reflects that the respondent is no longer employed by Morton Thiokol, Inc., and has moved from LaFayette, Louisiana, to Butte, Montana. The respondent states that he is unemployed. Under these circumstances, the petitioner submits that the proposed settlement disposition of these cases is fair and reasonable, fully takes into consideration the criteria under section 110(i) of the Act, and is in the public interest.

The petitioner states that the respondent proposes to pay the settlement amount of $400 in monthly installments, and has tendered the first installment of $135 with his settlement letter of July 13, 1989, a copy of which is included with the petitioner's settlement motion. The remaining two installments of $132.50 each will be paid over the next 2 months.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion filed by the petitioner IS GRANTED, and the settlements ARE APPROVED.

ORDER

The respondent IS ORDERED to pay the agreed-upon civil penalty assessments in the aforementioned amounts, and in accordance with the aforementioned payment schedule agreed to by the parties. This decision will not become final until such time as full payment is made by the respondent to the petitioner, and I retain jurisdiction in this matter until payment of all installments are remitted and received by the petitioner.

In the event the respondent fails to make full payment, or otherwise fails to comply with the terms of the settlement, petitioner is free to file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the cases.

George A. Koutras
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203
(Certified Mail)

Mr. Carl A. Johnson, 3335 Keokuk Street, Butte, MT 59701
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 27, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 89-12 A. C. No. 15-16216-03502
v.	:	
	:	No. 1 Mine
GEORGE'S BRANCH COAL, INCORPORATED, Respondent	:	

ORDER OF DEFAULT

On October 11, 1988, you signed a notice of contest (blue card) telling the Mine Safety and Health Administration (MSHA) that you wanted a hearing on the penalty which MSHA proposed. The Secretary of Labor has certified that the Proposal in this case was mailed November 14, 1988.

Subsequent to filing the Proposal, the Solicitor in a letter dated February 1, 1989, stated that based on a January 31, 1989, telephone conversation with you she was forwarding a draft of a Joint Motion to Approve Settlement formalizing your negotiated settlement. You were to review this document and then return a signed copy to the Secretary. On April 13, 1989, the Solicitor orally advised she had not received the signed copy or heard from you since the January 31, telephone conversation.

Thereafter, on May 12, 1989, you were ordered to answer or show cause for your failure to do so. You were told that if you did not comply you would be held in default.

The Solicitor has now filed a motion for default. In her motion the Solicitor states that on July 12, 1989, MSHA advised that they had received a check from you in the amount of $441.33. However, the Solicitor states that this represents payment of only one-third of the originally assessed amount and that no settlement was entered into reducing the original penalty. You cannot resolve this matter by deciding on your own initiative what amount you wish to pay without agreement by the Solicitor and approval by the Commission. Finally, you have not complied with the May 12 show cause order. Consequently, the Solicitor and this Commission have been forced to spend an inordinate amount of time on this matter.

Accordingly, judgment by default shall enter in favor of the Secretary. As a result, you are hereby ORDERED TO PAY the sum of $882.67 immediately.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Ann T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. David S. Strong, Owner, General Delivery, Whick, KY 41390 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

JUL 27 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT VAUGHN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-28-D
SUMCO, INC. AND R.E. SUMMERS, Respondents	:	

SUPPLEMENTAL DECISION AND ORDER

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Complainant; Rodney E. Buttermore, Jr., Esq., Forester, Buttermore, Turner & Lawson, Harlan, Kentucky, on behalf of Respondents.

Before: Judge Broderick

On June 2, 1989, I issued a Decision on the merits in the above proceeding. I directed the parties to attempt to stipulate as to the monetary amount due complainant Vaughn under the decision. Should they fail to stipulate, I directed the Secretary to submit a statement of the amount claimed due. Respondents were given ten days to respond to the statement.

On July 7, the Secretary filed a statement of the amount she contends is due under the decision with interest to July 15, 1989. Respondents did not reply to the statement.

Considering the entire record and the parties contentions, Respondents are ORDERED:

1. To pay to Complainant Vaughn within 30 days of the date of this order the sum of $4470.93, representing back wages from June 30, 1988 to December 4, 1988, which amount includes interest to July 15, 1989.

2. To pay interest at the rate of 1.38 per day after July 15, 1989, until the total amount due is paid.

3. To pay to the Secretary, within 30 days of the date of this order, a civil penalty in the amount of $100.

4. This order supplements the decision issued June 2, 1989, and with that decision represents my final decision and order in this proceeding.

James A. Broderick
Administrative Law Judge

Distribution:

Mary K. Spencer, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Rodney E. Buttermore, Jr., Esq., Forester, Buttermore, Turner & Lawson, P.S.C., P.O. Box 935, Harlan, KY 40831 (Certified Mail)

Mr. Robert Vaughn, P.O. Box 273, Kenvir, KY 40847 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 31 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 89-19 A.C. No. 15-13469-03687
v.	:	
GREEN RIVER COAL CO., INC., Respondent	:	Docket No. KENT 89-76 A.C. No. 15-13469-03693

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary); B. R. Paxton, Esq., Paxton & Kusch, Central City, Kentucky for Green River Coal Co., Inc. (Green River).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for six alleged violations of mandatory safety standards contained in the above dockets. The alleged violations involve the same mine and were consolidated for the purposes of hearing and decision. Pursuant to notice, the consolidated cases were heard in Owensboro, Kentucky on June 7, 1989. Lewis Stanley, James F. Ranks, Michael V. Moore, and Bobby Clark testified for the Secretary. Jessie W. Campbell and Mike McGregor testified for Green River. Both parties filed post hearing briefs limited to the legal question whether order No. 3227686 was properly modified after its termination. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

FINDINGS COMMON TO ALL VIOLATIONS

1. Green River is the owner and operator of an underground coal mine in Hopkins County, Kentucky known as the No. 9 Mine.

2. Green River employs approximately 200 miners, and produces approximately one million tons of coal annually.

3. The subject mine liberates in excess of one million cubic feet of methane in a 24 hour period.

4. During the 24 month period from June 23, 1986 to June 22, 1988, Green River had 1,059 paid violations of mandatory standards. Of these, 80 were violations of 30 C.F.R. § 75.301, 13 were violations of 30 C.F.R. § 75.302, 8 were violations of 30 C.F.R. § 75.1710, and 73 were violations of 30 C.F.R. § 75.503. This is a substantial history of prior violations, and penalties otherwise appropriate will be increased because of it.

5. All of the violations charged in these proceedings were abated promptly in good faith.

CITATIONS 3228886 AND 3228887

An explosion occurred in the subject mine at about 10:30 a.m., on June 23, 1988, at the crosscut right off the No. 2 entry in the 003 section, while coal was being loaded. The ignition was of short duration and self-extinguishing. It resulted in first and second degree burns to the loader operator.

When the Federal mine inspector arrived at the scene at about noon, he discovered that the line curtain for the crosscut was installed 22 feet from the toe of the coal. The section foreman was present. He testified at the hearing that a line curtain had been installed about 7 or 8 feet from the coal face but apparently had been removed prior to the explosion.

The mine has a history of methane liberation and has experienced prior ignitions or explosions at the face. Many citations for ventilation violations had been issued to the mine. Methane was found at the site of the explosion ranging from 1.6 to 2 percent.

The approved ventilation plan for the subject mine requires that in working faces there shall be a minimum of 3000 cubic feet of air in each working face where coal is being cut, mined or loaded.

The inspector checked the air flow at about 12:15 p.m. on June 23, 1989, and found only 1800 cubic feet a minute of air reaching the end of the line curtain in cross cut right off the No. 2 entry in 003 section.

The inspector issued a section 107(a) imminent danger closure order and two section 104(a) citations, charging violations of 30 C.F.R. § 75.302-1 and § 75.301-1.

The order and the citations were terminated the same day they were issued, when a line curtain was installed to the toe of the coal, the air increased to 3825 cubic feet a minute, and the methane reduced to .2 percent.

CITATION 3228988 AND ORDERS 3228563 AND 3228564

The coal seam height in the subject mine varies from 54 inches to about 60 inches. Therefore it has been required since January 1, 1975, to have substantially constructed canopies or cabs on all self propelled electric face equipment employed in active workings.

The subject mine has a generally poor roof condition. It has had 88 reported roof falls.

On March 18, 1988, a Federal coal mine inspector saw a cutting machine being operated without a canopy over the operator. The canopy was loose--the bolts holding it were backed off and the hudraulic mounting alignment brackets were broken off. The machine operator stated that he did not use the canopy because of the danger that it would fall on him. In the inspector's judgment, the condition had existed for a considerable period of time--certainly for more than one shift. The roof in the area was in good condition.

The inspector issued a section 107(a) imminent danger closure order and a section 104(a) citation (3228988) charging a violation of 30 C.F.R. § 1710. He had issued another citation for a cutting machine without a canopy only a short time prior to this.

The citation was terminated the same day when the bolts on the canopy were tightened, the brackets were welded back on, and the canopy positioned over the operator.

On August 22, 1988, a Federal mine inspector observed a loading machine being operated at or near the last open crosscut, with its canopy swung around over the tram motor. It was not over the operator of the loader. The pin which held it from swinging away from the operator had been removed. No roof problems were noted in the area at the time. The inspector issued a section 104(d)(1) order at 9:40 a.m., charging a violation of 30 C.F.R. § 75.1710. The order was terminated at 10:15 a.m. the same day when the canopy was moved back over the operator, and the pin replaced.

At 10:25 a.m. the same day, the same inspector noticed a cutting machine in the No. 5 entry of the No. 5 unit, on which the canopy was swung away from the operator and positioned over

the wheel of the cutter. Order 3228563 was issued charging a violation of 30 C.F.R. § 75.1710. The order was terminated at about 11:00 a.m. the same day when the canopy was placed over the cutter operator and the pin put in place.

Respondent has regular safety meetings with its employees, and has instructed them of the requirements for maintaining canopies on electric face equipment when operating inby the last open crosscut.

ORDER 3227686

On August 12, 1988, a Federal coal mine inspector was in the No. 3 Unit of the subject mine when the power was shut off because of a ventilation problem. He noticed four 110 volt pumps pumping water inby the last open break. These were nonpermissible pumps, and were pumping water to a 480 volt permissible pump. Coal was being produced until the power was shut off. The highest methane reading in the area was .4%. The inspector issued a section 104(d)(1) order (3227686) charging a violation of 30 C.F.R. § 75.507. A citation had been isued about two months previously, and an order about six weeks previously for essentially the same conditions. The order was terminated at 10:30 a.m. the same day when the pumps were removed outby the last open crosscut.

The order was modified on April 24, 1989, to correct the standard allegedly violated from § 75.507 to § 75.503.

REGULATIONS

30 C.F.R. § 75.302-1 provides in part:

§ 75.302-1 Installation of line brattice and other devices.

(a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the Coal Mine Safety Manager, in the approved ventilation plan, shall oe installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located.

30 C.F.R. § 75.301-1 provides:

§ 75.301-1 Quantity of air reaching working face.

A minimum quantity of 3,000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined or loaded and any other working face so designated by the District Manager, in the approved ventilation plan.

30 C.F.R. § 75.1710 provides in part:

An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies, or cabs, to protect the miners operating such equipment from roof falls and from rib and face rolls.

§ 75.1710-1 Canopies or cabs; self-propelled electric face equipment; installation requirements.

(a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1), (2), (3), (4), (5), and (6) of this section, be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls. the requirements of this paragraph (a) shall be met as follows:

(1) On and after January 1, 1974, in coal mines having mining heights of 72 inches or more;

(2) On and after July 1, 1974, in coal mines having mining heights of 60 inches or more, but less than 72 inches;

(3) On and after January 1, 1975, in coal mines having mining heights of 48 inches or more, but less than 60 inches;

(4) On and after July 1, 1975, in coal mines having mining heights of 36 inhes or more, but less than 48 inches;

30 C.F.R. § 75.507 provides in part:

Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air.

§ 75.507-1 Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements.

(a) All electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible except as provided in paragraphs (b) and (c) of this section.

30 C.F.R. § 75.503 provides:

§ 75.503 Permissible electric face equipment; maintenance.

[STATUTORY PROVISIONS]

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

CONCLUSIONS OF LAW

JURISDICTION

Respondent Green River is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation of the No. 9 Mine. I have jurisdiction over the parties and subject matter of this proceeding.

VENTILATION VIOLATIONS

Green River does not seriously contest the violations charged as a result of the investigation of the explosion on June 23, 1988. It suggested that the line curtain might have come down as a result of the explosion, but its own witness, the section foreman, did not support this suggestion. The evidence clearly establishes that the line curtain was not hung to within 10 feet of the face, and that the airflow at the end of the line curtain was substantially less than required. Violations of 30 C.F.R. § 75.302-1 and § 75.301-1 were clearly established. Because the mine liberates more than one million cubic feet of methane in a 24-hour period, and has a history of face ignitions, the violations were extremely serious. In fact, they resulted in an explosion and an injury to a miner. Both conditions should have been ascertained by management, especially given the mine's history. I conclude that they resulted from Green River's

negligence. Considering the criteria in section 110(i) of the Act, the proposed penalties of $1400 for each violation are appropriate.

CANOPY VIOLATIONS

The roof in the subject mine is unstable. Eighty eight roof falls have been reported to MSHA. The canopy requirement has applied to the subject mine since 1975. The three alleged violations were clearly established: the equipment involved, all items of electric face equipment, were used inby the last open crosscut. The violations were all very serious: that involving the cutting machine (Citation 3228988) was especially aggravated, since the operator was in jeopardy if he used the canopy or if he did not use the canopy. All of the violations were known or should have been known to mine management. They resulted from Green River's negligence. Considering the criteria in section 110(i) of the Act, $1,000 for the violation cited in citation 3228988 and $800 for each of the violations cited in orders 3228563 and 3228564 are appropriate penalties.

PERMISSIBILITY VIOLATION

Respondent does not contest the facts that on August 12, 1988, there were four 110 volt nonpermissible pumps pumping water inby the last open crosscut. Neither does it deny that these facts establish a violation of 30 C.F.R. § 75.503. Rather, it argues the modification of the citation on April 24, 1989, was improper and that it does not comport with the mandate of the statute that a copy of the order be given promptly to the mine operator.

There was no question at the time the order 3227686 was issued that Green River was being charged with operating nonpermissible electric face equipment in and inby the last open crosscuts (a violation of 30 C.F.R. § 75.503). It was not charged, nor did it offer evidence to indicate that it believed it was charged with operating nonpermissible electric face equipment in return aircourses (a violation of 30 C.F.R. § 75.507-1). The violation was abated by removing the pumps outby the last open crosscut. Respondent was not misled. See Secretary v. U.S. Steel Mining Co., Inc., 6 FMSHRC 722 (1984) (ALJ). I conclude that a violation has been established, and the modification of the order does not vitiate it.

The violation was serious. Green River No. 9 is a gassy mine, and an arc from one of the pumps could cause an ignition or explosion if it contacted a methane buildup. The violation was obvious and Green River was aware or should have been aware of it. I conclude that it resulted from Green River's negligence.

that Mr. Tabor may have made to Mr. Torres with respect to his inspection (Tr. 363). He also confirmed that he had no personal knowledge concerning the missing guards cited on August 31 or September 1, and that records concerning guards removed for maintenance are not made because "we do it every day." He assumed that the plant or lead foreman would have knowledge of those matters (Tr. 370).

Mr. Fulghum confirmed that he had no personal knowledge that the guards which were removed and not in place on September 1, were replaced before the plant went into production at 11:00 a.m., or 11:30 a.m., and that his knowledge of this was based on what he was told by Mr. Tabor and Mr. Johansson (Tr. 374-375). However, Mr. Fulghum stated that he saw the guards in place later in the evening at approximately 5:00 p.m. when the plant was in operation (Tr. 376).

Mr. Fulghum stated that the employees cited for not wearing suitable protective footwear were engaged in shovelling and cleaning up under the plant screen tower, and that the only type of "sneaker" that an employee may wear is one that has steel shank inserts (Tr. 376, 380).

Mr. Fulghum stated that the rock plants are mobile, and he described their locations at this project site by reference to certain photographs (Tr. 394-396).

Inspector Torres was recalled as the court's witness, and he denied that Mr. Tabor ever informed him on August 31 or September 1, 1987, that the cited guards had been removed from the equipment to be repaired. He also stated that with respect to two of the guarding citations, Mr. Tabor informed him that the guards had been on the equipment but were removed, but that he did not offer any reason for their removal (Tr. 399-400).

Mr. Torres confirmed that even if Mr. Tabor had informed him that the equipment was locked out and the guards removed for maintenance, he would still have issued the citations because there would have been insufficient time to replace all of the cited guards before the plant went into production (Tr. 400-401).

With regard to the safety shoe citation, Mr. Torres confirmed that he simply observed one employee wearing ordinary tennis shoes and did not speak to him or examine the shoes. Mr. Torres confirmed that the employee was cleaning material from under the screening station and he was concerned that 4 or 5 inch rock materials would fall from the upper levels of the plant, and if he were a maintenance employee, a heavy tool could fall on his foot. Mr. Torres also confirmed that the cleaning took place while the equipment was shutdown (Tr. 401-403).

Mr. Torres confirmed that according to his interpretation of the safety shoe standard, all employees working in the plant need to wear safety shoes, and that according to his inspector's manual, safety shoes are considered to be hard-toe shoes.

Mr. Torres stated that if anyone had informed him that the guards had been replaced prior to leaving the plant site at 2:00 p.m., on September 1, he would have gone back and checked them and terminated the citations. He stated further that the replacement of the guards was only mentioned during the close-out conference (Tr. 407). He also confirmed that Mr. Fulghum never informed him that the guards had been removed for maintenance or repairs, but that Mr. Tabor informed him that this was the case at the end of the close-out conference (Tr. 412-413).

An MSHA Mine Identification Form filed by the respondent's project manager Lars Johansson on February 19, 1986, contains the following information (Exhibit ALJ-2):

1. The assigned MSHA Mine ID for the respondent's Cerrillos Dam Project is shown as 54-00289, and the facility is identified as a "Rock Quarry-Surface."

2. The mine location address is shown as Dillingham Construction, Inc., P.O. Box 7430, Ponce, Puerto Rico 00732.

3. The respondent's corporate name is shown as Dillingham Construction International, Inc., a State of Nevada Corporation.

4. The corporation identified in item #3 above is identified as a subsidiary of Dillingham Construction Corporation, 7100 Johnson Drive, Pleasaton, California 94565, the parent corporation.

A copy of an MSHA computerized "Mine Inspection and Violation History" for the period January, 1986 through October, 1987, reflects the following information:

1. The Cerrillos Dam Project is identified as a "Sand & Grav" operation employing 36 individuals.

2. Two "regular" MSHA inspections were conducted at the facility during the periods August 31 to September 2, 1987, and February 9, 1987 to February 10, 1987.

One MSHA compliance (CFI) inspection was conducted on June 29, 1987.

One MSHA "Compliance Assistance visit" (CAV) inspection was conducted during the period November 3 to November 4, 1986.

3. During the period November 3, 1986, through September 1, 1987, the respondent was issued a total of 52 citations for alleged violations of various mandatory safety and health standards found in Part 56, Title 30, Code of Federal Regulations.

Twenty-eight (28) of the total violations noted were issued during a CAV inspection conducted on November 3 and 4, 1986.

Fifteen (15) of the total violations noted were issued during a regular inspection conducted on February 9 and 10, 1987.

Nine (9) of the total violations noted were issued during a regular inspection conducted on September 1, 1987, and they are the contested citations in issue in the instant proceedings.

Findings and Conclusions

The Jurisdictional Question

Section 4 of the 1977 Mine Act, 30 U.S.C. § 803, provides that "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce . . . shall be subject to the provisions of this Act."

Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1)(c), defines "coal or other mine" in pertinent part as "an area of land from which minerals are extracted . . . and lands, excavations, . . . facilities, equipment, machines, . . . used in, or to be used in, the milling of such minerals . . . ."

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

> Finally, the structures on the surface to be used in or resulting from the preparation of the extracted minerals are included in the definition of "mine." . . . [B]ut it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep, No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. 7 ADMIN. NEWS 3401, 3414.

MSHA's Part 56 mandatory safety and health standards for surface metal or nonmetal mines, define the term "Mill" as including, inter alia, "any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine."

The term "mill" is defined by the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, in pertinent part as follows at page 706:

> [T]he whole mineral treatment plant in which crushing, wet grinding, and further treatment of the ore is conducted.
>
> In mineral processing, one machine, or a group, used in comminution. This older limitation of the term has today been broadened to cover the whole mineral treatment plant in which crushing, wet grinding, and further treatment of the ore is conducted. By common usage, any establishment for reducing ores by other means than smelting. More strictly, a place or a machine in which ore or rock is crushed.

The term "milling" is defined in part at page 707 as "The grinding or crushing of ore. The term may include the operation of removing valueless or harmful constituents and preparation for market."

The thrust of the respondent's jurisdictional argument, as expressed through the testimony of its Project Safety Engineer, Gerald Fulghum, is that it "excavates" limestone and siltstone materials and does not engage in an "extraction" of these materials, or in any activities associated with the extraction of such materials. The respondent further relies on Mr. Fulghum's assertion that the term "milling" involves the separation of a valuable ore from undesirable contaminants, and that since the respondent performs no such separation, it cannot be considered to be engaged in a milling operation. In support of his arguments, Mr. Fulghum relies on an MSHA/OSHA Interagency Agreement, published in the Federal Register on April 17, 1979, 44 Fed. Reg. 22827-22830 (Exhibit ALJ-1), and in particular, the definitions of "Mining and Milling" found in Appendix A to the agreement, at page 22828, which defines these terms as follows:

> Mining has been defined as the science, technique, and business of mineral discovery and exploitation. It entails such work as directed to the severence of minerals from the natural deposits by methods of underground excavations, opencast work, quarrying, hydraulicking and alluvial dredging. Minerals so

excavated usually require upgrading processes to effect a separation of the valuable minerals from the gangue constituents of the material mined. This latter process is usually termed "milling" and is made up of numerous procedures which are accomplished with and through many types of equipment and techniques.

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

The respondent further argues that its principal business is that of dam construction, and that it is not engaged in the normal business of mining as a means of selling any of its excavated materials on the open market. Respondent maintains that the processing of any excavated limestone is incidental to its dam construction activities, and it suggests that if jurisdiction attaches under the Act, the enforcement of its activities should lie with OSHA, and not with MSHA. In support of this argument, the respondent relies on MSHA Policy Memorandum No. 88-2M, dated October 23, 1986, which "clarified" the MSHA/OSHA Agreement, and it states in pertinent part as follows (Exhibit ALJ-1):

Recently, several inquiries regarding questions of jurisdiction indicate the apparent need to further clarify the Interagency Agreement between the Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA). Especially of concern are those areas in which a mineral is extracted for purposes other than its intrinsic value as a commodity. The operations listed below delineate some of these types of facilities but are not limited to the following:

(a) key cuts in dam construction (not on mining property or used in mining);

* * * * * * *

The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed. The mineral extracted incidental to the primary purpose of the activity may be processed and disposed of however the operator may choose. At these types of operations, MSHA would not have jurisdiction since they would not be functioning solely for the purpose of producing a mineral.

The respondent further relies on an MSHA Program Policy Manual provision published on July 1, 1988, Release I-1, Volume I, Section 4, page 3, concerning the MSHA/OSHA Agreement, which states in pertinent part as follows:

> MSHA and OSHA have entered into an agreement to delineate certain areas of inspection responsibility, to provide a procedure for determining general jurisdictional questions, and to provide for coordination between the two agencies in areas of mutual interest. MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral.
>
> MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity. Under this circumstance, a mineral may be processed and disposed of, and MSHA will not have jurisdiction since the company is not functioning for the purpose of producing a mineral. Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following:
>
> 1. Key cuts in dam construction (not on mining property or used in mining);
>
> * * * * * * *
>
> The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed.

Finally, the respondent asserts that its dam project in Ponce, Puerto Rico, is within the jurisdiction of the local Puerto Rico Occupational Safety and Health Administration which has exercised its mandate for the health and safety oversight of the respondent's employees under rules and regulations promulgated by the OSHA Act of 1970, and that neither MSHA or the Commission has jurisdiction in these matters.

In Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3d Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material, and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and that the work of preparing minerals is included with the Act whether or not extraction is also being performed by the operator. The court stated as follows at 602 F.2d 592:

> Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it--the word means what the statute says it means.

Donovan v. Carolina Stalite Company, 734 F.2d 1547 (Ct. App. D.C. Cir.), decided May 15, 1984, concerned a slate gravel processing facility operated by Stalite adjacent to a stone quarry independently owned and operated by another company. Approximately 30 percent of the stone quarried at this operation was delivered to Stalite by a conveyor system, and Stalite "bloated" the slate in a rotary kiln with intense heat, and produced a light-weight material called "stalite" which was crushed and sized and sold to be used in making concrete masonry blocks. Addressing the question as to whether Stalite was engaged in mineral milling and preparation, subjecting it to MSHA jurisdiction, or whether its operation was "primarily manufacturing in nature," subjecting it to OSHA jurisdiction, a Commission Judge found that Stalite was engaged in milling subject to MSHA's jurisdiction. In view of the fact that mineral milling and preparation are not specifically covered in the Act, the judge relied on three of the specific examples found in Appendix A to the interagency agreement - heat expansion, crushing, and sizing--in concluding that Stalite was engaged in milling subject to MSHA's jurisdiction.

On appeal of the judge's decision, the Commission took a narrow view of the term "milling" to include only facilities that engage in the "extraction, milling, and preparation of minerals," and concluded that Stalite did not engage in mining "in its classic sense." Relying on the fact that Stalite did not do the actual extraction of the slate and that its only contact with the mineral occurred after it had been extracted and crushed at the quarry, the Commission considered Stalite's treatment of the mineral to be "a manufacturing process" that results in a product, rather than a "milling" process under the Act, and reversed the judge's decision. The Commission gave no weight to the judge's reliance on the interagency agreement, and ruled that the question of MSHA's regulatory authority is to be determined by the scope of the Mine Act's coverage, and not by the agreement.

The court reversed the Commission, and relying on the statutory definition of a mine and the legislative history of the Act reflecting an intent by Congress that the Act be broadly construed, it held that Stalite was subject to the Act. Although agreeing that the interagency agreement "suffers from a degree of internal inconsistency," the court found the examples of milling processes detailed in the agreement to be of particular relevance, 734, F.2d 1552-1553. The court also took note of the

agreement by other circuit courts with its interpretation of the Act, and the "sweeping definition" of the definition of a mine found in section 3(h) of the Act. Marshall v. Stoudt's Ferry Preparation Co., supra; Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981).

Erie Blacktop, Inc., 3 FMSHRC 135 (January 1981), concerned an operator who was engaged in a road paving and blacktopping operation which was not subject to MSHA's enforcement jurisdiction. However, the operator simultaneously utilized front-end loaders, a secondary crusher, and other equipment while engaged in a limestone mining operation which mined, crushed, and processed limestone, some of which was sold to and used by the Corps of Engineers for certain lake erosion projects, as well as for road and paving projects. I found that the respondent's limestone operation constituted a mining operation subject to the Act, as well as to MSHA's enforcement jurisdiction and the mandatory safety and health standards found in Part 56 of Title 30, Code of Federal Regulations.

San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980), concerned an open pit limestone quarry which extracted limestone for use in the production of cement. The limestone was crushed to produce a finely ground power used in the finished product,. and the judge held that this was a crushed stone operation subject to the requirements of Part 56 of Title 30, Code of Federal Regulations.

Nevada Mineral Processing, Docket No. WEST 88-273-M, decided by Judge Lasher on May 24, 1989, concerned a small gold and silver milling operation which did not extract the minerals, but did process and assay them using conveyors, a crusher, and a pulverizer. Judge Lasher concluded that the facilities and equipment were used in the work or milling or preparing the minerals, and that the operation clearly fell within the definition of a mine found in section 3(h)(1) of the Act, and was subject to the standards found in 30 C.F.R., Part 56.

In National Cement Company, Inc., 3 FMSHRC 1951 (August 1981), I rejected an operator's contentions that it was not operating a "mine" within the meaning of the Act, or conducting a "milling operation" within MSHA's jurisdiction. The plant in question was located 7 miles from a quarry where limestone was mined and transported by trucks to the plant for screening and crushing. Another quarry located closer to the plant supplied limestone by means of conveyor belts. I found that the plant constituted a mining operation within the statutory definition found in section 3(h)(1) of the Act, and I stated as follows at 3 FMSHRC:

> It seems clear to me that the statutory definition of a mine establishes that it was Congress' intent that MSHA regulate any milling activity which is an integral part of a mine, since mines fall within the specialized jurisdiction of MSHA and since mine employees typically operate such facilities. On the facts of this case, it also seems amply clear to me that the respondent's cement plant, even if it can be classified as a milling operation, is still an integral part of its limestone mining operation. Without the raw mineral material (limestone) respondent could not produce cement. Therefore, it seems further clear to me that respondent's operations, whether they be characterized as a crushed stone operation or a milling operation, are both subject to the Act as well as to MSHA's enforcement jurisdiction, and my conclusions in this regard are based on the statutory aforementioned definition of the term "mine" as well as the MSHA-OSHA memorandum of understanding.

The facts in the instant proceedings establish that MSHA has exercised its enforcement jurisdiction and authority over the respondent's rock plants since November, 1986, when it first visited the site at the respondent's invitation to conduct a CAV consultation visit which resulted in the issuance of non-penalty notices of violations. Regular inspections followed which resulted in the issuance of several non-compliance violations. All of these inspection activities have been limited to the respondent's rock plants, and did not include the actual dam construction work.

The local Puerto Rico OSHA (PROSHA) has also conducted inspections at the worksite, but apparently only pursuant to specific complaints. After the issuance of the contested citations in these proceedings, respondent's safety engineer Fulghum asserted that MSHA lacked jurisdiction over the rock plants, and a subsequent meeting between MSHA and local PROSHA representatives did not result in any agreement to consolidate jurisdiction with one agency. I take note of the fact that although the interagency agreement in question provides that where questions of jurisdiction cannot be resolved at the local level, they shall be submitted to the National Offices of the agencies and, if still unresolved, to the Secretary of Labor, the respondent has not sought such advise or rulings from these National Offices, and raised the jurisdictional issue after the inspection which resulted in the contested citations.

With regard to the interagency agreement, the respondent has obviously seized on the definition of "milling" and has focused on that definition to support its argument that it is not engaged in a mining activity. However, respondent has conveniently

overlooked the fact that its limestone rock crushing and processing activities fall precisely within the examples cited in the agreement of identical mineral and mining operations which MSHA has authority to regulate. The court in the Carolina Stalite Company case, supra, found these examples to be of particular relevance in finding that Stalite's activities were subject to the Act and MSHA's regulatory authority.

The respondent's narrow view that milling is limited to the separation of valuable ore from undesirable contaminants for its intrinsic value for sale or use in the general market place is rejected. I believe the term milling, as used in the Mine Act, has a broader definition which is in keeping with the intent of Congress that the Act be broadly construed with respect to any regulatory enforcement, and that any jurisdictional doubts be resolved in favor of including a facility within the coverage of the Act. While it may be true that any typical milling operation may involve some separation of the valuable ore from the contaminants, I find no such requirement in the Act or MSHA's regulatory standards, and I agree with the petitioner's argument that the interagency agreement cannot supercede the language found in the Act.

The respondent's reliance on the language found in the MSHA policy manual of July 1, 1988, which states that MSHA has jurisdiction only over operations whose purpose is to extract or to produce a mineral, and does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity is rejected. In the first place, such policy memorandums are not binding on the Commission and may not supercede the plain jurisdictional language found in the Act, and the controlling case precedents. Brock v. Cathedral Bluffs Shale Oil Co., BNA 4 MSHC 1033 (D.C. Cir. 1986). Further, as correctly pointed out by the petitioner, the limestone material extracted by the respondent is extracted for its intrinsic value as a commodity, and then processed and used in the construction of the dam (Tr. 279, brief, at pg. 9). Further, as noted earlier, the dam was located at the site in question because of the availability of the limestone, and when the on-site deposits were being depleted, the respondent had to look to other sources to continue with the project. In short, the availability, extraction, processing, and use of the limestone is a critical part of the dam construction activity.

The credible testimony and evidence reflects that the location of the dam site was selected because of the projected availability of calciferous rock, mostly limestone and siltstone, which is desirable for producing coarse and fine filter material for the dam embankment. The limestone is blasted and/or excavated by a D-9 ripper from the dam spillway area and it is processed at the primary and/or secondary rock plants where it is crushed, screened, sized, and stockpiled for use in the dam

construction. The processing includes the sizing of the rock materials to meet the rock size and stability criteria established by the Corps of Engineers. While it is true that the respondent does not extract any particular mineral from the excavated rock, the excavated material which is processed at these rock plants is used in some phase of the construction project. Limestone materials purchased from nearby quarries are bought on-site and are processed at the respondent's filter or terciary plant, and they are also used for the project, including the production of cement for use in the dam construction.

Inspector Torres confirmed that he has observed the extraction and processing of limestone at the site, and that this included the use of explosives, bulldozers, front-end loaders, haulage trucks, grizzles, screens, and primary and secondary crushers and conveyor belts. Inspector Perez confirmed that he has observed materials being processed at the plant, and that it included "washing, classifying, and grinding."

The respondent agrees that the term "Mill," as defined in 30 C.F.R. § 56.2, includes the excavation of minerals, including limestone, and any crushing, grinding, or screening plant used in connection with such excavation, and concedes that its activities have these same similarities and characteristics, and fall within the definition of "Mill" as stated in section 56.2. The respondent acknowledged that it engaged in excavation work, and operates a screening and crushing plant that fall within this definition (Tr. 265-266). It also conceded that the sizing and crushing of limestone defines a milling process which is subject to MSHA's jurisdiction (Tr. 275).

In view of the foregoing findings and conclusions, and after careful consideration of all the arguments and evidence adduced in these proceedings, I agree with the petitioner's position in this case, and I conclude and find that the respondent's rock processing plants constitute a "mine" within the meaning of section 3(h)(1) of the Act, and that its facilities, equipment, and machines in these plants are used for mineral milling within the meaning of the Act and MSHA's definition of "mill" found in 30 C.F.R. § 56.2. I further conclude and find that MSHA has inspection and enforcement jurisdiction and authority over these rock processing activities. The respondent's arguments to the contrary ARE REJECTED.

Interstate Commerce Issue

Section 4 of the Act provides as follows:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and

every miner in such mine shall be subject to the provisions of this Act.

"Commerce" is defined in section 3(b) of the Act as follows:

> Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof.

The use of the phrase "which affects commerce" in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See: Brennan v. OSHA, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB 332 U.S. 643 (1977); Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

Perez v. United States, 402 U.S. 146 (1971), held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

Mining is among those classes of activities which are covered by the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act, and court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review commission, 540 F.2d 1012 (9th Cir. 1976), where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted intrastate affect commerce sufficiently to subject the mines to Federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976); Marshall v. Bosack,

463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980); Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

A state highway department operating an intrastate open pit limestone mine, the product of which is crushed, broken and used to maintain county roads was held to be subject to the Act. Ogle County Highway Department, 1 FMSHRC 205 (January 1981).

A crushed stone mine operation that had an MSHA "Mine ID" number and was inspected by MSHA was held to be subject to the Act because the sales of rock products, as well as the use of equipment manufactured out of state, affected commerce within the meaning of the Act's jurisdictional language. Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982). See also: Southway Construction Co., 6 FMSHRC 174 (January 1984).

A gravel mine operator conducting activities solely within a state was held to be subject to the Act because its local mining activity had an impact on interstate market. Rockite Gravel Co., 2 FMSHRC 2543 (December 1980), Commission Review Denied January 13, 1981; Scoria Products Branch, Ultro, Inc., 6 FMSHRC 788 (March 1984); Southway Construction Co., supra.

N.Y.S. Department of Transportation, 2 FMSHRC 1749 (July 1980); Island County Highway Department, 2 FMSHRC 3227 (November 1980); and County of Ouray, Colorado, 9 FMSHRC 1205 (July 1987), all held that products affect commerce where they have an intrinsic value as a commodity which would have to be purchased elsewhere if not produced by the operator.

In the instant case, Inspector torres confirmed that most of the respondent's equipment, such as the Caterpillar haulage trucks, and bulldozers, crushers, etc., were shipped to Puerto Rico from the states (Tr. 165-166). Mr. Fulghum confirmed this and stated that all of the equipment used at the rock plant facilities in question originated from sources outside of Puerto Rico and was brought in from another dam site located in California (Tr. 361). He also confirmed that the respondent's parent company, Dillingham Construction International, is a Nevada Corporation, that the Cerrillos Dam Project is one conducted by Dillingham Construction, a Delaware Corporation, and that Dillingham North America, which has constructed dams in California, is a California corporation (Tr. 219-220). Use of equipment that has moved in interstate commerce affects commerce. See United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975). In addition, although it may be true that the limestone

excavated and processed by the respondent at the dam site was used intrastate, given the broad interpretation and coverage of the Act as intended by Congress, and as construed by the courts, it may reasonably be inferred that such use of the mined product would necessarily impact upon interstate commerce. See Fry v. United States, 421 U.S. 542, 547 (1975).

I conclude and find that the respondent's limestone rock processing activities and plants, including the facilities, equipment, and machines used in the processing of the limestone for use in the construction of the dam, which I have concluded constitutes a mining operation covered by the Act, affect commerce within the meaning of the Act, and that the respondent is within its reach.

Federal Pre-Emption

The respondent's assertion that since the enforcement of its dam construction activities has been delegated to the local Puerto Rico OSHA department, MSHA's regulation of these activities at the site is improper, is rejected. The same argument has been raised in cases in which Commission judges have consistently held that state and federal OSHA statutes do not preempt the 1977 Mine Act. See: Brubaker-Mann, Inc., 2 FMSHRC 227 (January 1980); Valley Rock and Sand Corporation, 4 FMSHRC 113 (January 1982); Black River Sand and Gravel, Inc., 4 FMSHRC 743 (April 1982); San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980); Sierra Aggregate Co., 9 FMSHRC 426 (March 1987). I agree with these holdings, and take note of the fact that section 506 of the 1977 Mine Act permits concurrent state and federal regulation, and that under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixie Lee Ray v. Atlantic Richfield Company, 435 U.S. 151, 55 L.Ed.2d 179 (1978); Bradley v. Belva Coal Company, 4 FMSHRC 982, 986, (June 1982).

Fact of Violations

The respondent is charged with five violations of the equipment guarding requirements of 30 C.F.R. § 56.14001, which provides as follows:

> Gears, sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw-blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

In Secretary of Labor v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, (September 24, 1984), a case involving the guarding requirements of section 77.400(a), a surface mining standard containing language identical to section 56.14001, Judge

Broderick rejected an operator's contention that it was virtually impossible for a person not suicidally inclined to contact the unguarded moving parts in question. In affirming the violation, Judge Broderick accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission interpreted the application of the guarding standard as follows at 6 FMSHRC 2097:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

The reliable and probative unrebutted testimony of the inspector establishes that guards were not provided or in place on the cited equipment in question. With respect to four of the citations, the inspector confirmed that maintenance is only performed when the equipment is shutdown, and this obviously served as the basis for his non-S&S findings as to those citations. In my view, the fact that the equipment was not in operation at the time of the inspection, or the fact that it is shutdown when serviced, may serve to mitigate the gravity or seriousness of the violation, but may not serve as an absolute defense to the requirement of the standard that the equipment components detailed therein be guarded. The intent of the standard is that exposed moving machine parts which may be contacted by persons in the normal course of mining activity and in the normal course of their work duties in or around such equipment be guarded to prevent contact, either inadvertently, or from inattention or carelessness. As stated in the Thompson Brothers case, any determination as to whether or not a reasonable possibility of contact with unguarded machine parts will occur

must be considered in the context of the criteria stated in that decision, including the fact that once normal plant production operations begin, miners may be exposed to hazards resulting from unguarded equipment.

With regard to the lack of guarding on the feeder motor belts, the inspector stated that employees would be in the area on a daily basis to clean spillage, and that at least one person would be present for inspection once the plant started up. He believed that anyone caught in the unguarded motor belts could lose a finger or an arm, or suffer disabling injuries. Access was provided to the plant third level primary screening station where the unguarded equipment was located by means of a ladderway.

With regard to the unguarded conveyor belt counterweight pulley, although it was located 20 to 25 feet above ground level, the inspector confirmed that it was located next to a walkway and that the unguarded area was approximately 8 inches from the walkway. He stated that the walkway provided an access way to the transfer point behind the pulley, and that employees would regularly walk by the unguarded pulley. Given the size of the pulley, and his past experience that accidents have occurred by employees being caught by an unguarded pulley of this size, he believed that anyone caught in the unguarded pulley in question would suffer fatal injuries.

With respect to the unguarded belt tail pulley at the secondary crusher plant, the inspector confirmed that it was located approximately 1 foot from the floor level, and while a guard had previously been provided, it had been removed and not replaced. This pulley was about the same size as the previously cited counterweight pulley, and the inspector believed that at least one maintenance man would be exposed to the hazard of being caught in the unguarded pulley.

With regard to the unguarded belt tail pulley located in the secondary crusher plant at ground level under the cone crusher, the inspector stated that he was advised that a guard had been provided, but had been removed. He confirmed that employees would in the area for clean-up and maintenance work, and would be exposed to a hazard.

The respondent's testimony and evidence does not rebut the inspector's findings that at the time of his inspection and observation of the equipment, guards were not provided or in place on the cited equipment in question. The respondent's defense is that no employees were exposed to any hazard because the plant was not in operation at the time of the inspection and that the equipment was shutdown and locked out for maintenance. Mr. Fulghum, the only witness presented by the respondent, was

not with the inspector at the time of his inspection and observations, and he maintained that section 56.14001, only applies when the equipment is in operation and there are moving parts which may be contacted and result in injuries. Mr. Fulghum asserted that he was informed by the shift superintendent Ike Tabor, that the guards had been removed on the morning of the inspection and were in the shop for repairs, and had been replaced by the time the plant had started up later that same day. Mr. Fulghum further asserted that Mr. Tabor explained this to the inspector at the time of the close-out conference on the day following the inspection.

Inspector Torres testified that when he left the site no one said anything to him about the guards being replaced before the plant started operation, and if they had, he would have gone back to terminate the citations (Tr. 407). He also confirmed that no one called him back to terminate the citations, and that during the close-out conference, Mr. Fulghum arrived late at the end of the conference, and said nothing to him about the guards being removed for repair (Tr. 409-410). Mr. Torres stated that Mr. Fulghum advised him that he would take the matter up with his supervisor, and that after Mr. Fulghum met privately with Mr. Tabor at the end of the conference, Mr. Tabor informed him for the first time that the guards had been removed and were in the shop for repairs. Mr. Torres believed that it would have been impossible to reinstall all of the missing guards prior to the time production resumed on the day of his inspection (Tr. 401).

Mr. Tabor was not called to testify in this case, and I find Mr. Fulghum's testimony as to what Mr. Tabor purportedly told him with respect to the removal and replacement of the guards in question to be less than credible. I find Mr. Torres to be a credible witness and I believe his version of the events in question.

Mr. Fulghum also defended the violations on the ground that section 56.14006, permits the removal of equipment guards when the equipment is being tested, and that in order to comply with section 56.14007, which requires that guards be of substantial construction and properly maintained, the most common way of doing this is to remove them during the shutdown procedure. These defenses are rejected. I find no credible evidence that the equipment in question was being tested at the time of the inspection, nor do I find any credible evidence that the guards were removed for maintenance or repair. With respect to Mr. Fulghum's argument that the respondent was in compliance with section 56.14029, because the equipment was shutdown when maintenance was performed, while this may true, I find it irrelevant. The respondent is not charged with violations of any of these other standards. It is charged with failing to provide guards on the cited equipment as required by section 56.14001.

I conclude and find that the credible testimony of the inspector establishes that the cited unguarded equipment constituted violations within the meaning and intent of section 56.14001, and that it supports each of the violations. Accordingly, the citations ARE AFFIRMED.

Citation No. 285900 - 30 C.F.R. § 56.11002

The respondent is charged with a violation of section 56.11002, which provides as follows:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

The inspector's unrebutted credible testimony establishes that the feeder walkway or platform located at the third level of the screening plant which was elevated approximately 12 feet from the next lower level was not provided with handrails. The elevated walkway was constructed and maintained to provide access to the number three feeder which was in the process of being modified. I conclude and find that the intent of the cited standard is to provide handrails at such locations in order to provide employees performing work with some means of protection against potential falls.

Respondent's witness Fulghum confirmed that the cited platform or walkway was part of the respondent's plant, and he did not deny the absence of handrails. Mr. Fulghum took the position that the three employees observed by the inspector on the elevated platform cleaning up and performing maintenance work were not employees of the respondent, but were employed by a contractor. Mr. Fulghum had no personal knowledge of this, and simply stated that Mr. Tabor told him during the closing conference that the employees worked for a contractor. Mr. Tabor did not testify in this case, and the inspector testified that Mr. Tabor confirmed to him that the employees worked for the respondent.

The respondent's defense is rejected. I accept the inspector's testimony as credible, and find that the three employees who were working on the platform in the respondent's plant and which was used to access the feeder owned by the respondent were exposed to a hazard of falling, and that the respondent is properly accountable for the violation. I conclude and find that the failure by the respondent to provide the required handrails constitutes a violation of section 56.11002, and the citation IS AFFIRMED.

Citation No. 2859002 - 30 C.F.R. § 56.11002

The respondent is also charged with a second violation of section 56.11002, for failure to provide handrails on the No. 6 feeder platform located at the second level of the secondary crusher plant. The inspector's credible testimony establishes that the platform was located approximately 10 feet above the second level floor and that it was used to provide maintenance for the shakers located on the platform. The inspector's unrebutted testimony also establishes that no handrails were provided, and Mr. Fulghum did not deny the absence of the handrails. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2859004 - 30 C.F.R. § 56.9007

The respondent is charged with a violation of section 56.9007, which provides that "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." The inspector's unrebutted testimony establishes that the cited No. 8 belt conveyor located in the secondary plant had an adjacent walkway which was parallel to the belt, and that the belt and walkway were inclined. The inspector confirmed that the walkway was regularly used by employees as a means of access from ground level to the crusher, and that the emergency stop cord, which was approximately 100 feet long, was broken in the middle and lying on the walkway.

Mr. Fulghum conceded that the stop cord in question was broken, and his defense is that the plant was shutdown and locked out, and that in the course of routine maintenance, someone would have found the broken cord and repaired it before production began. He confirmed that Mr. Tabor informed him that he was aware of the broken cord, and that it was repaired before production began. This defense is rejected. I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2859007 - 30 C.F.R. § 56.15003

The respondent is charged with a violation of section 56.15003, which states that "All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which may cause an injury to the feet." The inspector's belief that the standard requires employees to wear "steel-toed safety shoes" is incorrect. The standard only requires the wearing of "suitable protective footwear" without further elaboration. What may be suitable in one instance may not be suitable in another, and each situation must be addressed on a case-by-case basis.

In this case, Mr. Fulghum's credible testimony establishes that the respondent supplies steel protective footwear for its

employees, and he believed that leather boots are "suitable footwear" within the meaning of the standard. While this may be true, the credible testimony of the inspector reflects that one of the individuals who he observed cleaning up under the plant screening station was wearing ordinary tennis shoes of the "basketball variety." The inspector believed that this employee was exposed to a hazard of being struck on the foot by large rocks falling from the belt or from some of the upper levels of the plant. with regard to the other individuals, the inspector could offer no credible testimony or evidence as to the kinds of shoes they were wearing, and he did not speak to any of these individuals, nor did he inspect their footwear. Under the circumstances, I conclude and find that the one individual who was wearing tennis shoes did not comply with the cited standard in that ordinary tennis shoes are not "suitable" within the meaning and intent of the standard, and to this extent, a violation has been established. With respect to the other individuals, I conclude and find that there is insufficient evidence to establish any violation on their part. Under the circumstances, with respect to the employee who was wearing tennis shoes, the citation is limited to that one individual, and it IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Citation No. 285900, 30 C.F.R. § 56.11002

Based on the credible testimony of the inspector, I conclude and find that the violation concerning the lack of handrails on the walkway around the No. 3 feeder located on the third level of the screening station tower was significant and substantial. Three employees were observed performing clean-up and maintenance work on the walkway which was elevated some 12 feet above the next lower level. In the event of a fall, I conclude and find that the employees would likely suffer injuries of a reasonable serious nature. Under the circumstances, the inspector's S&S finding IS AFFIRMED.

Citation No. 2859001, 30 C.F.R. § 56.14001

With regard to the violation concerning the unguarded No. 5 conveyor belt counterweight pulley, I agree with the inspector's S&S finding. The evidence establishes that the guard usually provided for this large pulley had been removed and that the unguarded pulley area was approximately 8 inches from the edge of the adjacent walkway which was regularly used by employees as an access way to the transfer point behind the pulley. I conclude and find that in the event of a stumble or other inadvertent contact with the exposed and unguarded pulley while the belt was in operation, one would likely sustain injuries of a reasonably serious nature. Accordingly, the inspector's S&S finding IS AFFIRMED.

Citation No. 2859004, 30 C.F.R. § 56.9007

With regard to the violation concerning the broken conveyor belt emergency stop-cord, the inspector confirmed that the belt, which was used to convey stone materials from the ground level up the inclined belt to the stone crusher, was running at the time of his inspection. Although the inspector observed no one on the walkway adjacent to the belt at the time of his inspection, he confirmed that the walkway was used on a regular basis by employees who would walk along the walkway from ground level up to the cone crushers at the top level, and in the event someone were to fall into the moving conveyor, the inspector believed that he would likely suffer injuries and the belt could not be stopped because the emergency stop cord was broken. However, there is no evidence or testimony from the inspector from which one can conclude that it was reasonably likely that someone walking along the walkway adjacent to the belt would fall into or onto the moving conveyor belt. There is no evidence that employees ride the belt, nor is there any evidence with respect to whether the belt was elevated above the walkway, or whether it was recessed below the walkway in such a manner as to allow someone to readily fall into it. In short, I find no credible evidentiary support for the inspector's belief that someone simply walking along the walkway would likely fall into or onto the belt, or be exposed to any hazard from the materials on the belt. Under the circumstances, I cannot conclude that the evidence advanced by the petitioner in this instance supports the inspector's S&S finding. Accordingly, his finding IS VACATED, and the citation is modified to a non-S&S citation.

Citation No. 2859007, 30 C.F.R. § 56.15003

With regard to the violation concerning the employee who was wearing tennis shoes, the inspector conceded that he was wearing a hard hat, that the equipment was shutdown while the individual was cleaning up around it, and that cleaning and maintenance work is only performed when the equipment is shutdown. Although the inspector believed that someone could sustain a foot injury by rock falling off the conveyor belt (Tr. 95), I have difficulty comprehending how this would occur if the conveyors are shutdown while clean-up is being performed. Further, although the inspector also believed that an injury could occur if a heavy tool or equipment fell on someone's foot, there is no evidence that the employee wearing tennis shoes used any such tools or handled any heavy equipment which would likely fall and strike him on the feet. As for the inspector's belief that the employee could have been struck from a rock falling from an unspecified location above where he was working, I find his testimony to be speculative at best, and lacking in credible and probative value. Under the circumstances, I cannot conclude that the evidence advanced

by the petitioner supports the inspector's S&S finding. Accordingly, IT IS VACATED, and the citation is modified to a non-S&S citation.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The evidence establishes that approximately 32 to 36 employees out of a total employment compliment of 332 employees working in the dam project in question were engaged in the respondent's limestone processing operations (Tr. 148, 156). While there is no direct evidence as to the amount of limestone materials actually processed by the respondent, the information which appears in MSHA's proposed civil penalty assessments pleadings with respect to the respondent's size reflects an annual production tonnage or manhours worked as 102,559, and the parties stipulated that this was the case. I conclude and find that the respondent is a small operator. I also conclude and find that the civil penalty assessments for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent's history of prior assessed violations consists of ten (10) civil penalty assessments made by MSHA in 1987. I cannot conclude that the respondent's history of prior violations is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations in question in these proceedings.

Good Faith Compliance

The record establishes that on February 5, 1988, MSHA extended all of the abatement times until May 1, 1988, because the respondent's plant facilities were non-operational due to an expansion. All of the citations which are the subject of Docket No. SE 88-59-M, were terminated on April 21, 1988, and the citation in issue in Docket No. SE 89-23-M, was terminated on September 7, 1988. All of the terminations were based on the fact that the respondent corrected the cited conditions, and Inspector Perez confirmed that all of the citations were terminated on schedule (Tr. 181). Further, the parties agreed that all of the citations were timely abated in good faith by the respondent. Under the circumstances, I conclude and find that the respondent timely abated all of the violations in good faith.

Negligence

The inspector's moderate negligence findings as to each of the violations ARE AFFIRMED, and I conclude and find that all of

the violations resulted from the failure by the respondent to exercise reasonable care.

Gravity

On the basis of the inspector's testimony and findings with respect to each of the violations, including my findings and modifications with respect to the inspector's S&S findings, I conclude and find that Citation Nos. 2859000 and 2859001 are serious, and that the remaining citations are non-serious.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate in the circumstances of these proceedings:

Docket No. SE 88-59-M

Citation No.	Date	30 C.F.R. Section	Assessment
2858999	09/01/87	56.14001	$ 20
2859000	09/01/87	56.11002	$350
2859001	09/01/87	56.14001	$250
2859002	09/01/87	56.11002	$ 20
2859003	09/01/87	56.14001	$ 20
2859004	09/01/87	56.9007	$ 20
2859005	09/01/87	56.14001	$ 20
2859006	09/01/87	56.14001	$ 20

Docket No. SE 89-23-M

Citation No.	Date	30 C.F.R. Section	Assessment
2859007	09/01/87	56.15003	$ 20

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-136
	:	A.C. No. 46-05682-03502
v.	:	
	:	Ward Mine
TEN-A-COAL COMPANY, Respondent	:	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Patrick H. Cunningham, Partner, Ten-A-Coal Company, Clarksburg, West Virginia, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil assessments in the amount of $504 for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The respondent filed an answer denying the alleged violations, and a hearing was held in Clarksburg, West Virginia. The petitioner filed a posthearing brief, but the respondent did not. I have considered the petitioner's arguments, as well as the oral arguments made on the record by the parties during the hearing in my adjudication of this case.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(a) of the Act. Additional issues include the question of whether the violations are "significant and substantial," and the effect of

any assessed civil penalties on the respondent's ability to continue in business.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-7):

1. The respondent is the owner and operator of the Ward Mine, a strip mine located in Clarksburg, West Virginia.

2. The respondent and the mine are subject to the jurisdiction of the Act, and the presiding Judge has jurisdiction to hear and decide this matter.

3. The contested citations were properly served on the respondent by Frank J. Cervo, a duly authorized representative of the Secretary of Labor.

4. The respondent is a small operator, and its annual company coal production for the year 1988 was 90,569 tons. The Ward Mine had an annual production of 37,544, for this same time period.

5. The respondent's history of prior violations consists of two violations issued during four inspection days during the 24-months prior to the date of the issuance of the contested citations.

Discussion

All of the citations in this case are section 104(a) "S&S" citations issued by MSHA Inspector Frank J. Cervo during the course of an inspection conducted on November 16, 1987, and they are as follows:

Citation No. 2944563, cites a violation of 30 C.F.R. § 77.410, and the condition or practice states as follows:

The audible warning device provided for the Fiat-Allis dozer in service was inoperative in that when put in reverse the device would not give an alarm.

Citation No. 2944565 cites a violation of 30 C.F.R. § 77.410, and the condition or practice states as follows:

> The audible warning device provided for the 400 payloader in service was inoperative, when the payloader was put in reverse the device would not given an alarm.

Citation No. 2944564, cites a violation of 30 C.F.R. § 77.1605(a), and the condition or practice is described as follows:

> The windshield provided for the Fiat-Allis 31 Dozer in service was cracked at several locations.

Petitioner's Testimony and Evidence

MSHA Inspector Frank J. Cervo, testified as to his background and experience, and he confirmed that he issued Citation No. 2944563 (exhibit P-1), after determining that a bulldozer which was pushing spoil, or dirt, against a bank so that the coal could be removed, and the dirt replaced, had an audible warning device which was inoperative. Although the device was on the equipment, it did not work. He was informed that it was working when it was checked several hours prior to his inspection (Tr. 7-10).

Mr. Cervo stated that the mine is located between two public and busy highways, and the equipment was operating approximately 400 feet from the road. He estimated that the bulldozer had to travel approximately 200 feet while pushing the spoil material, and other than the three pieces of equipment which were operating in close proximity to each other, he observed no one on foot in the area where the bulldozer was operating. Mr. Cervo stated that the visibility to the rear of the bulldozer was very poor because it is high, and if someone had ventured on the property and walked behind the machine while it was in reverse, it would be highly unlikely that the operator would see him. He confirmed that the machine would likely operate in first or second gear, and he estimated the speed at 3 or 5 miles an hour. The weather was clear and sunny, and other than the noise from the equipment being operated at the same time, there were no other noise sources present (Tr. 11-13).

Mr. Cervo stated that he was concerned that curiosity seekers using the public highway, salesmen, or job applicants could have come on the mine property without the knowledge of the equipment operators. He believed that it was reasonably likely that anyone could be in the area at any given time, and that given the fact that there have been serious haulage accidents in the past at other mines involving people "wandering around" mine property, he believed it was reasonably likely that an accident

would occur, and that is the reason he considered the violation to be significant and substantial. He also believed that one individual would be affected by any accident or injury, and stated that "S&S is negligence on the part of the operator" because the foreman examined the equipment before it started in operation, but 3 or 4 hours had passed since the initial examination, and the operators of the equipment should have been trained to be alert for inoperative audible warning devices. It was the equipment operator's responsibility to stop the equipment and make the necessary repairs as the need occurs (Tr. 16). Mr. Cervo believed that a prior violation for inoperative alarms was issued during a prior inspection, but he was not sure (Tr. 17).

Mr. Cervo confirmed that it is not unusual for a backup alarm to malfunction because of vibration, weather, or normal wear and tear, but he did not know what caused the problem in this particular instance. He confirmed that the condition was corrected within a half hour. Mr. Cervo agreed that the equipment which was operating in the pit stripping coal would not be a hazard to any automobiles or people using the highway, and that any hazard would be confined to the pit area. He confirmed that the mine office is located in a garage, which is kept locked, and which was located 2,000 feet from the pit. The garage door has a sign on it which identified it as the mine office, and he did not believe that anyone would be in the office after work starts in the pit. He confirmed that the mine has two entrances along the roadway, and while there are no signs identifying the mine at those locations, there are stop signs present (Tr. 20).

Mr. Cervo confirmed that he has observed salesmen at the mine, and he believed that it was possible for a salesman to venture into the pit and walk behind a bulldozer while it was operating in reverse. He also confirmed that he has observed general curiosity seekers at other mines wandering around mine property observing coal extraction (Tr. 21). Although he was generally aware of prior accidents involving bulldozers backing over people, he could not recall any specific cases where this has happened (Tr. 22).

Mr. Cervo confirmed that an endloader and shovel were also operating in the pit area where the cited bulldozer was operating, and he estimated that they operated within 20 to 25 feet of each other, and if an accident did occur, it would involve one piece of equipment colliding with another. He also indicated that "it could very well be that an operator would get off his piece of equipment for some reason." He conceded that he issued the citation "to cover all eventualities" (Tr. 23).

Mr. Cervo stated that when he stopped the bulldozer and cited it, the other two pieces of equipment stopped operating within 2 minutes, and the operators got off their equipment to

see what the problem was, and he explained the situation to them (Tr. 25). Mr. Cervo believed that more than one piece of equipment operating without workable audible backup alarms would present a collision hazard, and he believed that the equipment operators were experienced individuals (Tr. 26).

Inspector Cervo confirmed that he issued Citation No. 2944565 (exhibit P-2), after finding an inoperative backup alarm on a payloader which was also pushing dirt. His inspection notes reflect that the payloader was not "surrounded by any other piece of equipment" (Tr. 28). Since the payloader is high, and the operator looks through the back window when he is backing up, Mr. Cervo believed that anyone on the property who may be walking or wandering through the area could have been run over. He believed that the operator's negligence was moderate because the equipment operators should take care of such problems as they arise (Tr. 29). He believed the violation was "S&S" because "if any employee got off his piece of equipment for any purpose and go walking across the roadway where this piece of equipment was operating, he could very well be ran over" (Tr. 30). Mr. Cervo confirmed that the violation was abated within a half hour, and he believed that the inoperative alarm condition may have been caused by a wire which may have loosened due to vibration (Tr. 30).

Inspector Cervo confirmed that he issued Citation No. 2944564 (exhibit P-2), after observing that the windshield of the cited bulldozer was cracked in several locations. He believed that the operator's visibility would be impaired because "the cracks were so designed and with the weather being a nice sunny day you get a rainbow effect" (Tr. 32). Mr. Cervo did not know how long the condition had existed, and he confirmed that the bulldozer was the same one he cited for an inoperative alarm (Citation No. 2944563). Mr. Cervo stated that the cracked windshield was obvious, and "anytime a windshield gets broken during the day in such a manner that it affects visibility this is the time to park it" (Tr. 32). He confirmed that section 77.1605(a) requires that all windshields be maintained in a safe and clean condition.

Mr. Cervo stated that the windshield in question was cracked in several locations near the center, and that any cracks started on the edge would work their way up near the center. He believed that the cracks in question would be in the line of vision of the equipment operator, and this would affect his safety because impaired visibility from shattered or cracked glass would not allow the operator to see anyone because the machine is high, and "it only takes a split second. You cold be on top of somebody" (Tr. 34). He explained further at (Tr. 32-34), as follows:

> Q. At what point do cracks in the windshield become severe enough to be considered not in good condition?

A. Cracks in safety glass will spread due to the stress of the machine, the vibration. Just a very small crack. However, there were several cracks in this one. For example, if it is in the center or around the edges that is pointing away from the corner it is subject to crack at any given time. And in addition to that, it has been known that glass, the machine gets on a stress and the glass kind of rubs where the crack is and can throw a little bit of debris back on the operator.

Q. But at what point would you say that a windshield is not in good condition, when it has a few cracks or what?

A. If a crack is from the edge like the corner and it goes from one corner to the other, a small crack of that nature, it makes like a half circle. It is very unlikely that will spread. But if it doesn't go from corner to corner then it will spread.

In addition to that, once a crack appears with the strain that the machine gets on and the stress and vibration with a very small crack even, it is subject to throw a piece of glass out because it is the weakest part of that glass now where the crack is.

* * * * * * *

Q. How would this cracked windshield affect the equipment operator himself, if at all?

A. It could possibly be since it is cracked even though there is no big sharp edges, if there were sharp edges it would be different. But since it is cracked at several places and you get on a strain from stress it could throw out a piece of glass between the cracks and strike the operator.

Mr. Cervo believed that the respondent was negligent for not ordering a new windshield when the crack first appeared (Tr. 35). Mr. Cervo confirmed that he permitted the respondent to remove the windshield in order to have time to order a new one, and that the equipment was allowed to continue in operation without a windshield (Tr. 36). Mr. Cervo confirmed that a windshield is not required, but if it is installed on the equipment, it must be maintained in good condition (Tr. 37). He agreed that it was not unusual to have cracks in windshields on equipment operating in pits (Tr. 38). He also agreed that the phrase "being in good condition" is subject to different interpretations, and that depending on the location of a crack, an operator is required to

replace cracked windshields as they occur. Impairment of vision and possible shattering would be two factors to be considered in making any determination as to whether or not a windshield is in "good condition" (Tr. 39).

On cross-examination, Mr. Cervo could not recall whether or not the cited windshield was installed in three sections, i.e., one big glass in the center and two smaller ones on each side of the back. He confirmed that he did not climb into the bulldozer for a view from the operator's compartment to determine whether the operator's visibility would be affected by the cracks in question. He also confirmed that the windshield glass is safety glass which is designed so that it will not shatter and fly (Tr. 41). When asked how he could determine that the operator's visibility would be impaired without his getting into the equipment and looking out from the operator's seat, Mr. Cervo stated "because if I have difficulty distinguishing, looking from the ground up, I am sure sitting in that seat you would have equal or greater visibility impairment than I do looking up there. If I had to look up and see, I kept watching to get the operator's attention" (Tr. 41). Mr. Cervo believed that the bulldozer in question was a second-hand piece of equipment purchased by the respondent at a sale (Tr. 41).

Mr. Cervo confirmed that when he was attempting to get the operator's attention by signalling to him, he was standing to the side of the machine, and that the operator could see him if he looked out of the side of the machine because there was no glass there and the windshield would not have impaired his vision (Tr. 43). When asked how he determined that the line of vision of the operator was impaired, Mr. Cervo responded as follows at (Tr. 44-45):

> A. I went around to the front of the machine after he had parked it and turned it off. I went around to the front of the machine and I looked up to see if I could see inside from the ground and it was difficult for me to look up to make any distinguishment of anything being in there.
>
> MS. EVE: Thank you.
>
> JUDGE KOUTRAS: That would be virtually impossible. This machine sets up pretty high, doesn't it?
>
> THE WITNESS: Yes. That machine sets up pretty high.
>
> JUDGE KOUTRAS: You could not very well see what was in there?
>
> THE WITNESS: Well, you can see the seats, you can see the steering wheel. You can see the operator.

JUDGE KOUTRAS: Did you have any difficulty seeing the operator or the seats or the steering wheel?

THE WITNESS: As well as I can remember, Your Honor, I had to, after he stopped I looked and looked and yes, there was a little impairment for me to look up in there from the ground and I am sure if I had been in the seat looking out it would have been the same thing.

JUDGE KOUTRAS: But you didn't sit in the seat?

THE WITNESS: No. I did not.

JUDGE KOUTRAS: You just did not think of it?

THE WITNESS: No. It is not that I did not think of it. I go up in the cab on a lot of occasions to check for other things. But like seat belts, if they are in a position where they required to wear them and the cleanliness of the machine, the fire extinguisher and things of that nature.

Respondent's Testimony and Evidence

Patrick H. Cunningham, the respondent owner and operator of the mine, testified that his foreman Bob G. Eubanks informed him that he had checked the cited audible backup alarms on the morning of the inspection, and that they were operating properly. Mr. Cunningham stated that the alarms are difficult to maintain because of the vibration of the equipment, and his equipment operators are instructed to check them in the morning and at noon to make sure they are operating. With more than one piece of equipment operating, the noise is such that equipment operators "get kind of immune to the warning devices and they don't hear them unless it is for an inspection" (Tr. 48). He confirmed that he has operated the equipment and may not hear the alarms except for periods when he stops to check them (Tr. 48).

With regard to the cracked windshield, Mr. Cunningham conceded that he was aware that it was cracked, but he did not believe it was cracked enough to cause it to be removed or replaced. In his opinion, the cracks did not hamper the visibility of the operator, and that given the fact that it was safety glass, he did not believe that it was likely that the glass would be fractured. He also stated that equipment vibration causes cracks and that "it is tough to keep windshields in this equipment because of the vibration" (Tr. 49).

On cross-examination, Mr. Cunningham stated that he has experienced cracking in safety glass, but when this occurs, the glass breaks into small fine pieces, and he has never seen it

"fly at any distance." He confirmed that he probably last inspected the windshield a few days before the inspection, and that the cracks in question were down low and would not hamper vision. He confirmed that the cracks could possibly have travelled in the line of vision of the operator between the time he observed the windshield and the time Mr. Cervo observed it on the day of his inspection (Tr. 51). He confirmed that he did not observe the windshield after it was removed because it was broken up during the process of removing it (Tr. 51, 53-54).

Mr. Cunningham confirmed that he operated the cited bulldozer 2 or 3-days prior to the inspection and that his vision was not impaired by the cracks in the windshield (Tr. 51). He believed that the cracks were present when he purchased the machine 3 or 4-months prior to the inspection (Tr. 53).

Mr. Cunningham stated that he has posted "no trespassing" signs at the entrance to the mine pit, and that he does not permit anyone on his operation unless one of his men are with them. He believed that it was unlikely that anyone could drive down to the pit area without one of his operators observing him and stopping him to determine his reason for being on the property (Tr. 54).

Mr. Cunningham confirmed that he employs three full-time employees consisting of a working foreman and two equipment operators (Tr. 6-7). He also indicated that his current mine production is down from past years, and that he averages 1,200 to 1,500 tons a month, and that he is behind in his taxes, and that his financial condition "is real bad" (Tr. 58). He believes that the proposed civil penalty assessments for the citations in question "would hurt us real bad, possibly cause me to have to close the mines down. It doesn't seem like a big amount to some people but a small operator with all the other expenses that we have, it means quite a bit to us" (Tr. 56). Mr. Cunningham confirmed that in addition to the pit in question, he operates two other pits which "are bad" in terms of being profitable (Tr. 57). He conceded that the cited windshield was cracked, and that the cited backup alarms were inoperative (Tr. 57).

Findings and Conclusions

Fact of Violations

Citation Nos. 2944563 and 2944565

The respondent is charged with two violations of mandatory safety standard 30 C.F.R. § 77.410, because the warning devices which were installed on the cited bulldozer and payloader were inoperative when the equipment was operated in reverse. The standard requires that such devices give an audible alarm when operated in reverse. The respondent admitted that the alarms

were inoperative, and the evidence presented in support of the violations establishes that this was the case. Accordingly, the violations ARE AFFIRMED.

Citation No. 2944564

The respondent is also charged with a violation of mandatory safety standard 30 C.F.R. § 77.1605(a), because of a cracked windshield on a bulldozer. The cited standard, which covers loading and haulage equipment, states that "Cab windows shall be of safety glass or equivalent, in good condition, and shall be kept clean." The inspector testified that he cited the condition after observing several cracks near the center of the windshield which he believed would impair the operator's visibility. He also believed that the cracked windshield was subjected to stress through machine vibration while it was in operation, and that a piece of glass could be dislodged and thrown back in the direction of the operator from the area where it was cracked.

The inspector conceded that he did not enter the cab to sit behind the operator's controls in order to determine whether the cracks would affect the operator's visibility. He contended that he had difficulty in getting the operator's attention while waving to him from the ground, and implied that this was due to the operator's impaired visibility due to the cracks. However, given the fact that the inspector confirmed that he was standing to the side of the machine while attempting to signal the operator, and conceded that the operator could clearly see him from the side of the machine from where he was standing, I find the inspector's testimony to be lacking in credibility.

The inspector also testified that after the machine was parked, he went to the front and looked up and found it difficult to see inside of the cab from the ground. However, he confirmed that even though the machine is "pretty high," he could see the seats, the steering wheel, and the operator, and that "there was a little impairment for me to look up in there from the ground and I am sure if I had been in the seat looking out it would have been the same thing." I find nothing in this testimony to establish that the windshield cracks impaired the inspector's ability to see into the cab from his position on the ground.

Mine operator Cunningham testified that he operated the cited piece of equipment 2 or 3-days prior to the inspection, and that his vision was not impaired. He believed that the windshield was cracked when he purchased the equipment 3 or 4-months prior to the inspection, and he did not believe that the glass would fracture because it was safety glass. The inspector confirmed that the windshield was constructed of safety glass, and that such glass is designed so that it will not shatter or fly. Further, the inspector agreed with Mr. Cunningham that it was not

unusual to have cracks in windshields of the equipment operating in the pits due to the vibration of the equipment.

The inspector confirmed that windshields are not per se required to be on the equipment. However, if a windshield is provided, it must be kept in "good condition." The standard contains no guidance as to what constitutes "good condition," and the inspector conceded that this phrase is subject to different interpretations, and that depending on the location of a crack, windshields are required to be replaced as they occur. He believed that impairment of vision and possible shattering were two factors to be considered in making any determination as to whether or not a windshield is in "good condition."

I agree with the inspector's opinion that impaired vision and the possibility of shattering are determining factors in any assessment as to whether a windshield is in good condition. However, based on the evidence adduced in this instance, I conclude and find that it is insufficient to establish that the cracks observed by the inspector impaired the operator's visibility or presented a possible shattering hazard. I find Mr. Cunningham's testimony that his vision was not impaired when he operated the machine with cracks in the windshield to be credible, and I find it highly unlikely that the safety glass, which is designed to preclude shattering, would shatter because of the cracks. I also take note of the fact that the inspector permitted the respondent to remove the windshield and to continue to operate the machine with the windshield completely removed while a new one was on order. Under all of these circumstances, I conclude and find that the petitioner has not established that the cited windshield was not in "good condition." Accordingly, I cannot conclude that a violation has been established, and the citation IS VACATED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonably likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Cervo confirmed that his significant and substantial finding was based on his general awareness of prior accidents at other mines involving people "wandering around" the mine and placing themselves in a position of being run over by an equipment operator who may not see them while backing up his machine with an inoperative backup alarm. Although Mr. Cervo could not cite any specific cases where this has occurred, he was concerned that "curiosity seekers" using the adjacent highway, salesmen, or job applicants, may venture onto the respondent's property without the knowledge of the equipment operators, and place themselves in a position of being run over by one of the machines. Mr. Cervo stated that he has observed salesmen visiting the respondent's mine, and has observed "curiosity seekers" "wandering around" other mines observing coal extraction. He also stated that he based his significant and substantial finding on his belief that an equipment operator leaving his machine and walking in the proximity of another operating piece of equipment could be run over, expressed a concern over a possible equipment

collision, and confirmed that he issued the citations "to cover all eventualities."

The evidence in this case establishes that the respondent's mining operation is very small and that the work force consists of two equipment operators, and a working foreman. The inspector conceded that any hazards would be confined to the mine pit area, and he agreed that the equipment operators were experienced miners, and that the normal operating speed of the equipment in question was 3 to 5 miles an hour in first or second gear. The inspector observed no one on foot, and there is no evidence that any salesmen, job applicants, or trespassers were on the property, or that such visitations occurred rarely or frequently. Although the inspector believed that an equipment operator would have reason to leave his machine, he apparently made no inquiries of the equipment operators as to whether or not they had any reason to leave their equipment and be on foot during the course of their normal work shift. Aside from the cited inaudible backup alarms, there is no evidence that any of the equipment was otherwise defective or had inoperable or defective brakes. Although one of the machines was cited for a cracked windshield, the inspector allowed it to continue to operate with the windshield removed, and there is no evidence that this condition impacted on the operator's view to the rear of the machine. While the inspector believed that the height of the equipment created poor visibility to the rear of the machines, the inspector did not climb into the machines to determine whether this was true or not, and none of the equipment operators were called to testify in this case.

With regard to the presence of any invitees or trespassers on the property, Mr. Cunningham's credible testimony reflects that "no trespassing" signs are posted at the entrance to the mine, and that the mine office was located 2,000 feet from the pit, and a sign was posted identifying it as the mine office. Although Inspector Cervo believed that no one would be at the mine office during the work shift, I find no credible evidence to support that conclusion, and Mr. Cunningham's unrebutted credible testimony reflects that no one is permitted on the site unless he is accompanied by one of his employees, and Mr. Cunningham found it highly unlikely that anyone would be in the pit area without being observed or stopped by one of the equipment operators. Under these circumstances, I conclude and find that any salesmen or job applicants would likely go to the mine office to state their business, and I find it unlikely that they would venture 2,000 feet into the pit area and place themselves in close proximity to a piece of equipment operating in reverse without being observed.

With regard to any equipment collision hazard, given the size of the equipment, and the fact that it is normally operated at very slow speeds by experienced operators, and in the absence

of any past accidents or incidents of this kind, I find it unlikely that such an accident would occur, and if it did, I find it unlikely that it would result in any serious personal injury to the operator of the equipment.

I take particular note of the inspector's admission that he issued the citations to cover "all eventualities." Although I agree that a surface pit mining operation such as the one operated by the respondent generally involves a working environment exposing miners to potential hazards, the question of whether any particular violation is significant and substantial must be based on credible evidence as to the existence of a hazard rather than on assumptions and speculation. On the facts of this case, and after careful review and consideration of Inspector Cervo's testimony in support of his "S&S" findings, I conclude and find that they were based on general and speculative assumptions with respect to any hazards exposure, rather than on any specific prevailing mining conditions from which one could reasonably conclude that the equipment operators or anyone else were in fact exposed to mine hazards likely to result in injuries of a reasonably serious nature. I further conclude and find that the petitioner has failed to establish by a preponderance of the credible and probative evidence adduced in this case that the violations were significant and substantial. Accordingly, the inspector's findings in this regard are rejected, and they ARE VACATED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The respondent is a very small mine operator, and although I have taken into consideration Mr. Cunningham's assertion that his operations may be marginally profitable, I conclude and find that the payment of the civil penalties assessed for the violations which have been affirmed will not adversely affect his ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent's history of prior violations consists of two violations issued during the course of four inspection days in the 24-months prior to the issuance of the contested citations in this case. I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in the assessment of the civil penalties for the violations which have been affirmed.

Good Faith Compliance

The inspector confirmed that the respondent took immediate steps to repair the equipment backup alarms, and that the violations were abated within a half hour. I conclude and find that

the respondent exercised rapid good faith compliance, and I have taken this into consideration.

Negligence

The inspector made a finding of "moderate" negligence for both violations, and he believed that the equipment operators are responsible for stopping the equipment and having it repaired as the need arises. He also agreed with Mr. Cunningham that the backup alarms could become inoperative at any time due to the vibration of the equipment. I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

On the facts of this case, and for the reasons stated in my "S&S" findings, I conclude and find that the violations were non-serious.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2944563	11/16/87	77.410	$ 25
2944565	11/16/87	77.410	$ 25

ORDER

Section 104(a) "S&S" Citation No. 2944564, November 16, 1987, 30 C.F.R. § 77.1605(a), IS VACATED. The respondent IS ORDERED to pay civil penalty assessments for the two remaining violations in the amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDER

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 24 ,1989

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 89-146-R
	:	Citation No. 2889705; 3/20/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine
	:	Mine ID #36-00856

DECISION AND ORDER DENYING MOTION FOR SUMMARY DECISION

Rushton Mining Company (Rushton) has filed a Motion for Summary Decision in the captioned case pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, seeking to vacate the cnallenged citation. The citation at issue, No. 2889705, alleges a violation of the standard at 30 C.F.R. § 70.510(b)(2) and charges as follows:

> A plan for the administration of a continuing effective hearing conservation program was not submitted for approval within 60 days following the issuance of the notice of violation that was issued on 1/17/89. The plan had not been submitted as of this date, 62 days after the issuance.

There appears to be no factual dispute that indeed a notice of violation was issued on January 17, 1989, under section 104(a) of the Act for a violation of 30 C.F.R. § 70.501 under "subpart F-Noise Standard. It is also undisputed that the citation on its face stated that a hearing conservation plan must be submitted to the Federal Mine Safety and Health Administration (MSHA) within 60 days of the issuance of that citation. It also appears to be undisputed that such a plan for a hearing conservation program was not submitted for approval within 62 days of the issuance of that citation.

Rushton argues however that the Secretary's regulations do not in fact require the submission of a hearing conservation plan upon a single showing of excessive noise levels during a periodic noise survey but rather only upon a subsequent showing of excessive noise levels during a supplemental noise survey conducted as required by 30 C.F.R. § 70.509.

The Secreary's regulations provide in relevant part as follows:

§ 70.507 - Initial Noise Exposure Survey

On or before June 30, 1971, each operator shall:

(a) Conduct, in accordance with this subpart, a survey of the noise levels to which each miner in the active workings of the mine is exposed during his normal work shift.

* * *

§ 70.508 - Periodic Noise Exposure Survey

(a) At intervals of the least every 6 months after June 30, 1971, but in no case shall the interval be less than 3 months, each operator shall conduct, in accordance with this subpart, periodic surveys of the noise levels to which each miner in the active workings of the mine is exposed and shall report and certify the results of such surveys to the Mine Safety and Health Administration, and the Department of Health and Human Services.

* * *

§ 70.509 - Supplemental Noise Exposure Survey; Reports and Certification

(a) Where the certified results of an initial noise exposure survey conducted in accordance with § 70.507, or a periodic noise exposure survey conducted in accordance with § 70.508, show that any miner in the active workings of the mine is exposed to a noise level in excess of the permissible noise level prescribed in Table I, the operator shall conduct a supplemental noise exposure survey with respect to each miner whose noise exposure exceeds this standard. This survey shall be conducted within 15 days following notification to the operator by the Mine Safety and Health Administration to conduct such survey.

* * *

§ 70.510 - Violation of Noise Standard; Notice of Violation; Action Required By Operator

(a) Where the results of a supplemental noise exposure survey conducted in accordance with § 70.509 show that any miner in the active workings of the mine is exposed to noise levels which exceed

the permissible noise levels prescribed in Table I, the Secretary shall issue a notice to the operator that he is in violation of this subpart.

(b) Upon receipt of a Notice of Violation issued pursuant to paragraph (a) of this section, the operator shall:

(1) Institute promptly administrative and/or engineering controls necessary to assure compliance with the standard. Such controls may include protective devices other than those devices or systems which the Secretary or his authorized representative finds to be hazardous in such mine.

(2) Within 60 days following the issuance of any Notice of Violation of this subpart, submit for approval to a joint Mine Safety and Health Administration-Health and Human Services committee, a plan for the administration of a continuing, effective hearing conservation program to assure compliance with this subpart.

The problem in this case arises from inartful draftmanship of the regulations. If subsection 70.510(b)(2) is read separate from and independent of the other provisions in the section it is clear that there was a violation as charged since it is undisputed that no hearing conservation plan was submitted within the 60 day period established by that regulation.

Indeed unless subsection (b)(2) is read in such a separate and independent manner it is in irreconcilable conflict and becomes nonsensical. It is of course a basic rule of construction that the interpretation that produces the greatest harmony and the least inconsistency ought to prevail. Sutherland Stat Const § 46.05 (4th Ed.)

Subsection 70.510(b)(2) must therefore be read separate and independent of the remainder of the section. It is in itself unambiguous in requiring the submission of a hearing conservation plan "within 60 days following the issuance of any Notice of Violation of this subpart" (Emphasis added). This interpretation is of course also consistent with that taken by the Secretary in this case and in her Policy Manual.

Under the circumstances the Motion for Summary Decision must be denied. The operator has not shown as a matter of law that it is entitled to such a decision. Commission Rule 64. Accordingly this case along with its related civil penalty proceeding (Docket No. PENN 89-197) will be set for hearing on the merits. While the Secretary has not filed a Motion for Summary Decision in this case it would appear,

based upon the undisputed evidence, that a violation of the cited standard did in fact exist and that such a Motion would be granted concerning the existence of the violation. A hearing would nevertheless be necessary on the remaining issue of whether the violation was "significant and substantial". In addition, issues under section 110(i) of the Act must be addressed in determining the appropriate penalty to be assessed in the related civil penalty proceeding.

Gary Melick
Administrative Law Judge
(703) 756-6261

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